

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: Chapter 11  
VIVUS, INC., et al., Case No. 20-11779 (LSS)  
Courtroom No. 2  
824 North Market Street  
Wilmington, Delaware 19801  
Debtors. August 25, 2020  
1:30 P.M.

BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN  
UNITED STATES BANKRUPTCY JUDGE

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1 (Proceedings commenced at 1:41 p.m.)

2 THE COURT: Thank you. Good afternoon, counsel.  
3 This is Judge Silverstein. We are here in VIVUS, Inc.; case  
4 No. 20-11779.

5 Ginger, please give everyone the protocol for the  
6 hearing.

7 THE CLERK: It is extremely important that you put  
8 your phones on mute when you are not speaking. When speaking,  
9 please do not have your phone on speaker as it creates  
10 feedback and background noise and it makes it very difficult  
11 to hear you clearly.

12 Also, it is very important that you state your  
13 name each and every time you speak for an accurate record.  
14 Your cooperation in this matter is greatly appreciated.  
15 Thank you.

16 THE COURT: Thank you.

17 Let me turn this over to debtors' counsel.

18 MR. BARR: Thank you, Your Honor. This is Matt  
19 Barr from Weil Gotshal. Can you hear me okay?

20 THE COURT: Yes.

21 MR. BARR: Thank you, Judge.

22 Your Honor, we have filed an amended agenda at  
23 Docket Number 214 that has roughly seventeen items. Just for  
24 the record, thank you very much, the first fourteen have  
25 already been entered by Your Honor, either on certification

1 of counsel or there were no objections in the second day  
2 hearings with respect to the first day motion, so thank you  
3 very much, Your Honor, for you and your chambers taking care  
4 of that.

5 We then have three matters that are going forward  
6 today. We have item number 15 which is the motion to assume  
7 our restructuring support agreement. We have item number 16  
8 -- I'm sorry. And on 15 we did file, Your Honor,  
9 certification of no objection with respect to that matter.

10 Item number 16 is the cash collateral matter and  
11 then item number 17 is the combined motion with respect to  
12 the disclosure statement, the solicitation procedures motion,  
13 and our confirmation hearing with respect to our joint  
14 prepackaged Chapter 11 plan.

15 If it's okay with Your Honor what we would like to  
16 do is to go forward with the combined hearing on the  
17 disclosure statement, solicitation and confirmation hearing,  
18 and then take up the other matters at the end of the hearing.

19 THE COURT: That's fine.

20 MR. BARR: Thank you, Judge.

21 So, again, thank you for the record. Matt Barr of  
22 Weil Gotshal on behalf of the debtors.

23 I'm joined here today by my colleagues, Mr. Gabe  
24 Morgan, Mr. Jared Friedmann and Ms. Natasha Hwangpo.

25 Also present, Your Honor, are certain members of

1 the management team: Ms. Jill Frizzley is virtually with us  
2 today. She's one of the independent directors of the company  
3 who filed a declaration in connection with today's hearing.  
4 And that's at Docket Number 188;

5 Mr. Thomas King, another one of our independent  
6 directors of the company who filed a declaration in  
7 connection with today's hearing at Docket Number 189;

8 Ms. Teri Stratton, managing director,  
9 restructuring in special situations at Piper Sandler, the  
10 retained investment banker in these cases filed a declaration  
11 in connection with today's hearing at Docket Number 191.

12 Mr. Ben Pickering, the principal in the  
13 restructuring advisory services group of Ernst Young,  
14 financial advisor retained in these cases and his declaration  
15 is at Docket 190 and;

16 Mr. Brian Karpuk who is a director of corporate  
17 restructuring at Stretto, debtors' claim agent and noticing  
18 agent who filed a declaration in connection with today at  
19 Docket Number 187.

20 Again, Your Honor, I know I speak for all of VIVUS  
21 employees, the board of directors, all of the debtors'  
22 advisors, I thank you and your colleague and chambers for  
23 scheduling today's hearing and making accommodations  
24 necessary through our virtual confirmation hearing for this  
25 very important hearing in VIVUS' corporate life cycle.

1 I'll provide some details in a moment but today is  
2 the culmination of an extensive process taking place over the  
3 course of several years. As the company has sought to repay,  
4 refinance and, ultimately, restructure its significant debt  
5 obligations in order to ensure the business continues as a  
6 going concern, preserve value for all stakeholders, including  
7 our equity holders and save jobs.

8 Unfortunately, despite those efforts, we were  
9 unable to avoid a Chapter 11 filing. But I am very pleased  
10 to stand here virtually today in our view with a confirmable  
11 prepackaged Chapter 11 plan that provides recoveries to all  
12 stakeholders in our capital structure, irrespective of the  
13 fact, as our expert testimony will demonstrate for Your Honor  
14 here today, that the enterprise value of the company does  
15 not, unfortunately, support such an outcome.

16 And that's a testament, Your Honor, for the  
17 efforts of the management team and the board here who, as the  
18 record show, turned over every stone in an effort to  
19 refinance or restructure this balance sheet before coming to  
20 these Chapter 11 cases.

21 Notably, the management team and the board  
22 insisted on negotiating recoveries for public shareholders  
23 and payment in full, in cash for unsecured creditors. Those  
24 are our vendor, trade creditors, employees, all other  
25 unsecured creditors save of our convertible noteholders.



1           So, Your Honor, with your permission, what we  
2 would like to do today is since our confirmation hearing is  
3 an evidentiary hearing, if it's okay with you, I would start  
4 with an opening. Obviously, if there's any parties that  
5 would like to provide any opening remarks, Your Honor I'm  
6 sure would allow them to do that.

7           We're then prepared to put on our case in chief  
8 through our witnesses, both by declaration and live  
9 testimony. We would then offer our witnesses to any parties  
10 that would like to cross examine them.

11           I'm having a hard time. I'm looking at you, but I  
12 know my camera is there, so please bear with me, as well as  
13 cross-examine any objectors if they put any of their  
14 witnesses forward. And Mr. Friedmann would handle that, Your  
15 Honor; after which the parties can provide Your Honor with  
16 argument on any of the outstanding objections. And Mr.  
17 Morgan from our firm would be handling and taking the lead on  
18 that.

19           And then, finally, if Your Honor was inclined to  
20 approve the plan, disclosure statement and solicitation, we  
21 did file a proposed amended plan and confirmation order which  
22 a combination of Ms. Hwangpo and I would go through with Your  
23 Honor at the end of the hearing.

24           So if that works for you, Your Honor, I would  
25 start with a brief opening.

1 THE COURT: I will hear openings, but I really  
2 want to make sure we get through the evidence, so that's up  
3 to you.

4 MR. BARR: Sure. So why don't we just right into  
5 evidence then.

6 THE COURT: That's fine.

7 MR. BARR: Okay. Great. So with that said, Your  
8 Honor, I'm going to turn it over to Mr. Friedmann.

9 MR. FRIEDMANN: Good morning, Your Honor. Jared  
10 Friedmann from Weil Gotshal on behalf of VIVUS and its  
11 affiliated debtors, debtors-in-possession. In advance of  
12 this afternoon's hearing, Your Honor, we coordinated with  
13 counsel from Saul Ewing who represents objecting stockholder,  
14 Steven Chlavin, on a proposal for how to present the evidence  
15 this afternoon, if I may share that with you.

16 We agreed, subject to Your Honor's approval, of  
17 course, that for two of debtors' witnesses, Ms. Frizzley and  
18 Mr. Karpuk, both of who are present in the courtroom today  
19 that we would simply enter those witnesses declarations into  
20 evidence, subject to cross examination or any objections in  
21 lieu of any live direct testimony from those two witnesses.

22 With respect to Ms. Stratton, Mr. King and Mr.  
23 Pickering, all of whom are also present in the courtroom, we  
24 agreed, again, subject to Your Honor's approval, that we  
25 would enter those witness' declarations into evidence,

1 subject, again, to cross-examination or any objections. That  
2 for those three witnesses we'd also conduct a live direct  
3 examination in order to introduce them, credential those  
4 witnesses which we did not do at the equity committee hearing  
5 a couple weeks ago, have them highlight certain facts in  
6 their declarations and certain issues that have arisen,  
7 including the supplemental objections since they submitted  
8 their declarations last Tuesday.

9           The goal, obviously, is to not have to cover  
10 everything in their declaration, but, of course, they would  
11 subject to cross on everything in their declaration, as well  
12 as their live testimony. So, Your Honor, if that proposal is  
13 acceptable to you, we would move forward with the witnesses.

14           THE COURT: That's acceptable. Make certain with  
15 respect to your witnesses that your direct testimony gets out  
16 the important facts that you think this case hinges on.

17           MR. FRIEDMANN: Understood, Your Honor.

18           THE COURT: Okay.

19           MR. FRIEDMANN: All right, thank you.

20           MR. FRIEDMANN: So, Your Honor, we would propose  
21 to begin with Ms. Frizzley and for the presentation of that  
22 witness, I'd like to turn the virtual podium over to Cory  
23 Kandestin of Richards Layton.

24           THE COURT: Mr. Kandestin. Mr. Kandestin, you  
25 must still be muted which I appreciate, but now I need you

1 live.

2 MR. KANDESTIN: May I please the court. Can you  
3 hear me now?

4 THE COURT: Yes.

5 MR. KANDESTIN: Good. Okay. Sorry about that.

6 For the record, Cory Kandestin, Richards Layton &  
7 Finger, co-counsel to the debtors.

8 The debtors filed a declaration in support of  
9 confirmation from Jill Frizzley. Ms. Frizzley, as Mr. Barr,  
10 mentioned, is the independent director who was appointed in  
11 connection with these bankruptcy cases. She also is the  
12 chair and sole member of the special independent committee  
13 that conducted the investigation of the debtor release that  
14 is proposed in the plan.

15 The sole topic of Ms. Frizzley's declaration was  
16 the debtor release investigation. She is here on Zoom today.  
17 She's available to answer any questions on cross, if  
18 necessary. There have been no objections, that I'm aware of,  
19 to the debtor release under the plan.

20 So, at this time, Your Honor, I'd move Ms.  
21 Frizzley's declaration into evidence.

22 THE COURT: Is there any objection to Ms.  
23 Frizzley's declaration being admitted into evidence?

24 (No verbal response)

25 THE COURT: I hear none. Does anyone have any

1 questions, wish to cross-examine Ms. Frizzley?

2 (No verbal response)

3 THE COURT: I hear no one.

4 (Declaration of Jill Frizzley, received into evidence)

5 MR. KANDESTIN: In that case, Your Honor, I yield  
6 the podium back to Mr. Friedmann.

7 MR. FRIEDMANN: Thank you.

8 Your Honor, Jared Friedmann, again, from Weil  
9 Gotshal.

10 We next respectfully move to enter into evidence  
11 the declaration of Brian Karpuk on behalf of Stretto which is  
12 debtors' solicitation and tabulation agent.

13 Mr. Karpuk's declaration was filed at Docket  
14 Number 187 and seek to have his declaration enter into  
15 evidence, subject to cross-examination or any questions that  
16 Your Honor may have for Mr. Karpuk.

17 THE COURT: Does anyone object to the entry into  
18 evidence of Mr. Karpuk's declaration?

19 (No verbal response)

20 THE COURT: I hear no one. Does anyone have any  
21 cross-examination of Mr. Karpuk?

22 (No verbal response)

23 THE COURT: I hear no one.

24 Mr. Karpuk, I have a couple of questions.

25 MR. KARPUK: Yes, Your Honor.

1 THE COURT: Do you know how many opt-out notices  
2 were mailed?

3 MR. KARPUK: We mailed out approximately 14,000  
4 opt-out notices with plan and disclosure statement to the  
5 underlying beneficial holders of existing equity.

6 THE COURT: 14,000?

7 MR. KARPUK: 14,000; yes, Your Honor.

8 THE COURT: And I saw in your declaration the opt-  
9 out detail, form details that there were opt-out forms that  
10 were withdrawn.

11 MR. KARPUK: That is correct, Your Honor.

12 THE COURT: Were there subsequent communications  
13 with, I guess, with parties to whom the opt-out notices were  
14 mailed?

15 MR. KARPUK: Yes, there were, Your Honor.

16 THE COURT: Can you tell me what those were?

17 MR. KARPUK: Sure. In approximately late July,  
18 based upon inquiries that we had received from existing stock  
19 equity holders and from parties who had submitted their opt-  
20 out forms at that time, the information that was being  
21 provided in those forms we determined that there would be  
22 difficulty in making a distribution to the existing stock  
23 equity holders without additional information from those  
24 parties. Specifically, we needed to know the nominees at  
25 which they held their stock so that those parties could be

1 instructed to withhold a distribution under the plan.

2           And so, as part of -- we reached out to the  
3 debtors' counsel and had conversation whereby we were asked  
4 to reach out to existing equity holders who had opted out as  
5 of that time. We were instructed to call them first and if we  
6 weren't able to get ahold of them or didn't have a telephone  
7 number for those parties, we reached out by email. And we  
8 asked them for, one, whether they have the nominee  
9 information that was going to be required in order to make  
10 the distribution and we also asked them if they had any other  
11 questions or whether they wish to revoke that opt-out form.

12           A significant number of parties, as we discussed  
13 with them, it seemed that they did not understand what the  
14 purpose of the form was. They needed our help or  
15 clarification as to if they wished to participate whether  
16 they should submit the form or not.

17           As you'll also see in my declaration, we received  
18 approximately 370 forms back, but over 200 of those or  
19 approximately 200 of those did not check the opt-out box.  
20 They just sent the form back in, signing it, but not opting  
21 out.

22           THE COURT: What did that mean to you?

23           MR. KARPUK: It was consistent with the questions  
24 that we were seeing from equity holders, what do I do with  
25 this form? Should I send it in? If I wish to participate in

1 the settlement, do I send this in or not? And so, I think,  
2 you know, based upon all of the communications that the  
3 Stretto team has had with existing equity holders, there were  
4 significant numbers -- a significant percentage of the party  
5 that returned their form were not intending were not  
6 intending to opt-out when they submitted the form.

7 THE COURT: Thank you.

8 Does that prompt any questions by anyone else?

9 MS. CASEY: Your Honor, this is Linda Casey on  
10 behalf of the United States Trustee. Thank you, Your Honor,  
11 for allowing me to appear solely by the (indiscernible) and I  
12 appreciate that.

13 I do not have any current questions for the  
14 witness; however, the debtors and I had discussed a statement  
15 from the debtors' counsel regarding this issue that I  
16 anticipate that they will be reading in later. And I'm not  
17 going to go back on my agreement not to cross-examine the  
18 witness, but this will be raised in argument and there will  
19 be additional facts presented to the court. Thank you.

20 THE COURT: Thank you.,

21 MR. MANOUSIOTHAKIS: I have a question, Your  
22 Honor. This is Vasilios Manousiouthakis.

23 THE COURT: Yes.

24 MR. MANOUSIOUTHAKIS: Was there any information  
25 requested that could have been violating the privacy rights



1 of the individuals involved, especially information on where  
2 shares were held and so on? And was there some similar  
3 request made to those people that did not opt out or was this  
4 -- could this be done in an effort to just reduce the number  
5 of opt-outs?

6 THE COURT: Mr. Karpuk, do you understand the  
7 question?

8 MR. KARPUK: I do, Your Honor.

9 The only information that we requested from  
10 stockholders who wished to opt-out was information necessary  
11 to withhold the distribution to them under the plan. We did  
12 not ask that information of parties who did not opt-out.

13 THE COURT: Thank you.

14 MR. DIJKSTRA: Your Honor, I have a question, if I  
15 may. Dennis Dijkstra.

16 THE COURT: Mr. Dijkstra, yes.

17 MR. DIJKSTRA: Mr. Karpuk, I went through the  
18 process very early on -- actually already of opting out  
19 through the form, also through my actions, but that's another  
20 story. And can you explain to me what that email was about,  
21 about the revoke in, revoke out? And I have no clue what it  
22 was about until (indiscernible) or Stretto never really gave  
23 me an answer as well. Can you please explain to me what the  
24 revoke in, revoke out? I couldn't understand it.

25 MR. KARPUK: That email was sent in order to

1 request additional information that was required in order to  
2 withhold a distribution. In order for every party that  
3 submitted an opt-out in order to make a distribution under  
4 the plan, we needed to know either that the nominee where  
5 those shares were held.

6 MR. DIJKSTRA: Can I respond to that?

7 So, I opted out and I got a revoke out email. My  
8 mother also owns shares with VIVUS and she thought she takes  
9 the box right. She filled everything in and she sent it out,  
10 but she never got a response.

11 And only by my doing saying why are you contacting  
12 me and not my mother I found that, by accident, just by  
13 accident she sends an opt form back without checking the box,  
14 so it means everybody else, maybe not so computer savvy or  
15 didn't check it right, they send out an opt-out and never got  
16 any response back. So you were only responding to people with  
17 a renewed or revoke in, revoke out when they check the box.  
18 But the people who do check the box they don't get any  
19 response back.

20 THE COURT: Let me ask a question based on that  
21 Mr. Karpuk. Did the email only -- did a follow-up email only  
22 go to people who had checked the opt-out box and it did not  
23 go to people where you received the form who did not check  
24 the opt-out box, is that correct?

25 MR. KARPUK: That is correct, Your Honor. We only

1 reached out to those parties who submitted an opt-out form  
2 with the box checked.

3 THE COURT: Okay. That gives factual information  
4 which I understand going to be somehow addressed later, so  
5 I'll withhold any thoughts I have until I hear what that  
6 discussion is.

7 If there are any more facts that we need to get  
8 from Mr. Karpuk?

9 (No verbal response)

10 THE COURT: Okay. I hear no one else.

11 Mr. Friedmann, does that prompt any questions from  
12 you?

13 MR. FRIEDMANN: None, Your Honor. Thank you.

14 THE COURT: Okay. I'm informed by my staff that I  
15 did not swear Mr. Karpuk in for his responses, so please, Mr.  
16 Karpuk, can you confirm to me that the responses that you  
17 provided were the truth, the whole truth, and nothing but the  
18 truth, to the best of your knowledge and ability?

19 MR. KARPUK: I can affirm that, Your Honor.

20 THE COURT: Thank you.

21 Okay. Mr. Karpuk, you may be excused.

22 MR. KARPUK: Thank you, Your Honor.

23 (Witness excused)

24 MR. FRIEDMANN: Your Honor, this is Mr. Friedmann  
25 again. Before we call the next witness, is it -- get your

1 permission for Ms. Frizzley also to be excused from this  
2 hearing?

3 THE COURT: Yes.

4 MR. FRIEDMANN: Thank you, Your Honor.

5 THE COURT: Can everyone hear me? I'm getting a  
6 note from my staff that it's difficult to.

7 Mr. Friedmann, can you hear me fine?

8 MR. FRIEDMANN: I can hear you fine, Your Honor.  
9 Thank you.

10 THE COURT: Okay. I'll certainly try and make  
11 sure I'm close to the microphone when I speak. Thank you.

12 MR. FRIEDMANN: Your Honor, with your permission,  
13 the debtors next wish to call Ms. Teri Stratton of Piper  
14 Sandler. And as an initial matter, before she is sworn in,  
15 we would respectfully move to enter into evidence Mr.  
16 Stratton's declaration which was filed as Docket Number 191,  
17 subject, of course, to cross-examination following her live  
18 direct testimony.

19 THE COURT: Is there any objection to the entry  
20 into evidence of Ms. Stratton's declaration, subject to  
21 cross-examination?

22 (No verbal response)

23 THE COURT: I hear no objection. It's admitted.

24 (Declaration of Teri Stratton, received into evidence)

25 And, Ms. Stratton, can you please raise your right

1 hand, please?

2 TERI STRATTON, DEBTORS' WITNESS, AFFIRMED

3 THE WITNESS: Yes.

4 THE COURT: Please state your full name and spell  
5 your last name for the record?

6 THE WITNESS: Teri L. Stratton; T-E-R-I, S-T-R-A-  
7 T-T-O-N.

8 THE COURT: Mr. Friedmann.

9 MR. FRIEDMANN: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. FRIEDMANN:

12 Q Ms. Stratton, can you please describe your occupation  
13 for the court?

14 A Yes, I'm a managing director in the restructuring and  
15 special situations group at Piper Sandler. We are a national  
16 investment bank and I work with clients who are stressed or  
17 distressed, helping them get through their issues whether in  
18 court or out of court, (indiscernible) et cetera.

19 Q And, Ms. Stratton, do you have any particular field or  
20 fields of expertise?

21 A My areas of expertise are restructuring and bankruptcy  
22 topics, financing and valuation work.

23 Q And, Ms. Stratton, what do you mean when you say  
24 bankruptcy and restructuring topic?

25 A There's many areas in finance that are specific

1 restructuring and bankruptcy, even how to value the company  
2 is very different than how to value a (indiscernible)  
3 company, knowing the different parts of the law and how plan  
4 of reorganization works, waterfall analyses, and the process.

5 Q And, Ms. Stratton, what do you mean when you say that  
6 you're an expert in the area of valuation?

7 A I have an MBA from the Anderson School at UCLA with  
8 honors with an emphasis in finance. I took many valuation  
9 courses. I have taught valuation courses for the Association  
10 of Insolvency and Restructuring advisors, Part II of the  
11 Certified Insolvency and Restructuring Advisors program with  
12 about plan of reorganization valuation. I've taught that  
13 class more than twenty or thirty times.

14 I train my staff in valuation. And I'm on the Fairness  
15 Opinion Committee for Piper Sandler where I review fairness  
16 opinions before they're approved by the committee.

17 THE COURT: Ms. Stratton, you're a little fuzzy  
18 for me, so can you make sure you're close to your microphone.  
19 Thank you.

20 THE WITNESS: Is that better? Is that better?

21 THE COURT: Maybe.

22 THE WITNESS: Let me see if I can make it higher.  
23 Is that any better? I'll just speaker louder.

24 THE COURT: I think it's a little better and just  
25 make sure you're speaking slowly.

1 THE WITNESS: Okay. Okay.

2 THE COURT: Mr. Friedmann.

3 MR. FRIEDMANN: That is better.

4 BY MR. FRIEDMANN:

5 Q And, Ms. Stratton, I want to break down what you  
6 explained. But, first off, and when you say the term  
7 valuation can you just explain what you mean by that?

8 A A valuation for the purpose of enterprise valuation  
9 where the company worth as a going concern.

10 Q Okay. How long have you been practicing in the fields  
11 of restructuring and corporate valuation?

12 A I've been doing restructuring for probably about  
13 twenty-five years. Prior to my investment banking career, I  
14 was a workout lender at a bank in California. I've been  
15 doing valuation work for about twenty years.

16 Q And, Ms. Stratton, as we just had submitted into  
17 evidence, you submitted a declaration in these cases in  
18 support of debtors' prepackaged plan of reorganization,  
19 correct?

20 A Yes.

21 Q And does that declaration describe your analysis of the  
22 estimated enterprise value of the debtors' businesses as a  
23 going concern?

24 A Yes, it does.

25 Q Have you ever performed this type of valuation analysis

1 before?

2 A Yes. At least fifty times in my career.

3 Q You mentioned your academic background before, Ms.  
4 Stratton, but it was a little fuzzy. We couldn't hear you  
5 that way. I just want to briefly go through that again.

6 Can you just very briefly describe your academic  
7 background?

8 A I have a Bachelor of Arts in economics from UCLA. I  
9 graduated in December '92 and I have an MBA with honors with  
10 emphasis in finance from the Anderson School at UCLA. I  
11 graduated in 2000.

12 Q And I apologize because also when it was a little  
13 difficult to hear you, but do you hold any specific  
14 certifications?

15 A I'm a CIRA, which is a certified insolvency and  
16 restructuring advisor. I also hold FINRA (indiscernible) and  
17 63.

18 Q How long have you been certified as an insolvency and  
19 restructuring advisor?

20 A It's been about fifteen years.

21 Q And, again, I think you may have mentioned this, but  
22 have you ever taught any courses or lectured in your fields  
23 of expertise?

24 A Yes. I have regularly taught the CIRA Level II course  
25 which is specifically for valuation components of



1 reorganization. I've also spoke a number of times at  
2 industry events, including the American Bankruptcy Institute  
3 for turnaround management associations, the Association of  
4 Insolvency and Restructuring Advisors on many topics  
5 including valuation.

6 Q And have you authored any publications regarding  
7 corporate valuations?

8 A Yeah, I have one white paper that I wrote with a lot of  
9 other attorneys and a fellow investment banker on Chapter 11  
10 bankruptcy sales which also went into value.

11 Q Great. And do you ever speak on the field of corporate  
12 valuation?

13 A Yeah. I think I just covered that. But as far as most  
14 of the organizations but ABI, TMA, ARRA, Valcon and several  
15 times have spoken specifically about valuation.

16 Q Okay. Great. I think you mentioned earlier also that  
17 you're a member of Piper Sandler's Fairness Opinion  
18 Committee. Can you explain exactly what that is?

19 A So a fairness opinion is often required for  
20 shareholders, especially public shareholders when they are  
21 buying or selling assets. The investment bankers in those  
22 different industry groups prepare the fairness opinion and  
23 schedule a meeting with a fairness opinion. We then go  
24 through and ask questions and try to poke holes into the  
25 valuation to make sure it stands -- that it's reasonable and

1 tested.

2 Q And in that role approximately how many other  
3 valuations have you reviewed?

4 A Probably thirty. I don't really know. I get an email  
5 that says I need be on the committee and I joined.

6 Q Okay.

7 MR. FRIEDMANN: Your Honor, pursuant to Federal  
8 Rule of Evidence 702 made applicable to these proceedings by  
9 Federal Rule of Bankruptcy Procedure 9017, at this time I  
10 respectfully wish to tender the witness, Ms. Teri L.  
11 Stratton, as an expert in the field of corporate valuation.

12 THE COURT: Are there any objections?

13 (No verbal response)

14 THE COURT: I hear none. I will recognize her as  
15 an expert in corporate valuation.

16 MR. FRIEDMANN: Thank you, Your Honor.

17 BY MR. FRIEDMANN:

18 Q Ms. Stratton, have you arrived at an opinion concerning  
19 the enterprise value of the debtors on a going concern basis  
20 as of the effective date?

21 A Yes.

22 Q Can you please tell us what that opinion is?

23 A My opinion is that the going concern value is \$225  
24 million dollars or less.

25 Q And have you arrived at an opinion, Ms. Stratton,

1 concerning whether the debtors will be solvent as of the  
2 effective date?

3 A I have.

4 Q And can you please share with us that opinion?

5 A The debtors are not solvent as of the effective date.

6 Q What is the basis of that opinion?

7 A The information was used from Mr. Pickering on the  
8 claim are greater than the value that was concluded in Piper  
9 and my analysis.

10 Q Do you understand, Ms. Stratton, that a number of VIVUS  
11 stockholders have challenged Piper Sandler's valuation  
12 analysis?

13 A Yes.

14 Q And how do you understand that?

15 A We have received many objections and additional  
16 information, as well as the equity committee hearing.

17 Q Have you had an opportunity to review all of those  
18 objections?

19 A I have.

20 Q Did your team consider any of the opposing  
21 stockholder's criticisms of Piper Sandler's valuation and the  
22 conclusions that you reached?

23 A Yes, we did.

24 Q In what way did you consider them?

25 A There were some requests for a different analyses and

1 in the week since the equity committee hearing, we have  
2 conducted additional analyses to (indiscernible) that none of  
3 those concerns were valid.

4 Q Did any of those criticisms ultimately change your  
5 opinion concerning debtors' enterprise value as of the  
6 effective date?

7 A No, they did not.

8 Q And did any of those criticisms ultimately change your  
9 opinion concerning whether the debtors would be solvent as of  
10 the effective date?

11 A No, they did not.

12 MR. FRIEDMANN: Your Honor, with your permission,  
13 I'd like to bring up as a demonstrative Exhibit B to Ms.  
14 Stratton's declaration.

15 THE COURT: Okay. Do you know if you have  
16 permission?

17 MR. FRIEDMANN: I believe that that was  
18 coordinated in advance and my colleague, Taylor Dougherty, I  
19 believe, was given the permission to be able to put that up  
20 on the screen.

21 THE COURT: Well that's fine then.

22 MR. FRIEDMANN: Thank you, Your Honor.

23 Thank you, Taylor.

24 BY MR. FRIEDMANN:

25 Q Ms. Stratton, do you recognize this presentation that's

1 just been put on the screen and can you explain to the court  
2 what this is briefly?

3 A Yes. This is a presentation that summarizes the  
4 conclusions of the valuation analysis by Piper Sandler that  
5 was used in the disclosure statement.

6 MR. FRIEDMANN: And, Ms. Dougherty, can you please  
7 turn to the presentation to page 4?

8 BY MR. FRIEDMANN:

9 Q Ms. Stratton, can you please explain what this slide of  
10 your presentation is showing?

11 A This shows the different methods of financial analysis  
12 that Piper used in coming to a valid conclusion.

13 Q And what were those methods of financial analysis that  
14 Piper Sandler used?

15 A We used a three generally accepted valuation method.  
16 The analysis had selected public companies comparable to the  
17 analysis of selected precedent transactions and the  
18 (indiscernible) cash flow analysis.

19 Q You used the term generally accepted, Ms. Stratton, can  
20 you explain for the court why these methods are generally  
21 accepted in your view?

22 A You know, obviously, there's new valuation theories and  
23 methodologies that come to past from time to time  
24 academically. These are the three methods that are almost  
25 always used. And almost every disclosure statement I have

1 ever read or a valuation I have done needed these three  
2 methodologies, so these are the three methodologies for  
3 decades have been used by valuation experts.

4 Q And you mentioned earlier, Ms. Stratton, that you had  
5 reviewed the objections of some of the objecting  
6 stockholders, correct?

7 A Yes.

8 Q Does that include Mr. Makosky's objection which had  
9 attached to it a letter from Mr. Ahmadi?

10 A Yes.

11 Q Okay. Do you recall that Mr. Ahmadi suggested in his  
12 letter that Piper Sandler should have also conducted a twice  
13 to earnings for EBITDA-based valuation of the debtors?

14 A I do.

15 Q Do you agree with Mr. Ahmadi's suggestion in that  
16 regard?

17 A I do not.

18 Q Can you explain for the court why?

19 A So each industry has different metrics that you would  
20 use for valuing on a comparable and market basis, market  
21 approach basis. So both have selected public comparables and  
22 have selected precedent transactions or market approaches  
23 where you compare other transactions or company to the target  
24 company.

25 And in this case, I would say argue first that a P/E

1 ratio is generally used by research analysts to determine  
2 whether or not a company is trading above or below comparable  
3 companies and not as much for valuation. And in this case,  
4 we did not an EBITDA- base approach.

5 We used a revenue-based approach because in both of  
6 those cases, earning and EBITDA while they're very wildly  
7 across pharmaceutical companies, depending on what they have  
8 drugs in development, where they are in development, what  
9 their marketing structure is, what their G&A structure is.

10 Some companies in pharmaceuticals don't have earnings.  
11 So the most used approach to pharmaceutical companies are  
12 metric in revenue because most -- usually publicly disclosed  
13 without precedent transactions and on public companies.

14 THE COURT: Mr. Friedmann, I can't hear you now.

15 MR. FRIEDMANN: I'm sorry. Thank you. I forgot  
16 to unmute myself.

17 BY MR. FRIEDMANN:

18 Q Turning back to Slide 4, Ms. Stratton, where you  
19 described the three methodologies that you used. I'd like to  
20 talk about them, but one at a time.

21 Can we start with the analysis of selected public  
22 comparables? Can you please walk us through your analysis  
23 using that methodology, please?

24 A Can we go to page 7 where we actually have the numbers  
25 behind it?

1           So in reviewing selected public comparables, the key is  
2 to find a set of companies that are comparable to the target.  
3 In this case VIVUS. My team and I spent considerable time  
4 coming up with the metrics we would need for this public  
5 company. These sixteen companies (indiscernible) all North  
6 American branded specialty pharmaceutical companies. They  
7 have enterprise values of approximately \$150 million to one  
8 billion. They market one or more branded specialty  
9 pharmaceutical products. And they are companies that have  
10 20/20 revenue estimates available.

11 Q       Ms. Stratton, in blessing these companies for your  
12 comparable public companies' analysis, were there any  
13 companies that you chose not to include?

14 A       No. Once we came up with the appropriate criteria and,  
15 again, that is (indiscernible) system of my specialty  
16 pharmaceutical partner. We've kept every company that met  
17 that criteria.

18 Q       And how can you be confident that you're not leaving  
19 out any relevant companies, that those were the right  
20 criteria?

21 A       We spent hours discussing the criteria and am very  
22 confident that my specialty pharmaceutical partner and the  
23 healthcare team at Piper knows the appropriate companies that  
24 we should be looking at.

25 Q       Ms. Stratton, what were the results of Piper Sandler's



1 comparable public company analysis?

2 A So if you see they applied the median, the median  
3 revenue multiples and that gave us a range of 208 to 224, the  
4 midpoint is 216. Actually, I should say we went above and  
5 below the median in their value to revenue.

6 Q Thank you, Ms. Stratton.

7 MR. FRIEDMANN: Ms. Dougherty, can we turn to back  
8 to Slide 4?

9 BY MR. FRIEDMANN:

10 Q Ms. Stratton, can you please walk us through the  
11 methodology that you have listed in the middle there, the  
12 analysis of selected precedent transactions?

13 A If I can go to page 8. This is the background for the  
14 precedent acquisition. We chose to include acquisitions of  
15 North American and European specialty pharmaceutical  
16 companies. It doesn't announce since January 1st 2015.

17 These are companies with commercial sage, branded  
18 specialty pharmaceutical products and have been five-target  
19 enterprise valuations from \$40 million to \$1.5 billion. They  
20 (indiscernible) any transactions that did not disclose LTM  
21 revenue.

22 (indiscernible) to page 9. These are purchases of  
23 North Americana and European Specialty Pharmaceutical  
24 products. Again, announced since January 1st of 2015. These  
25 are commercial sage branded specialty pharmaceutical

1 products.

2 And, again, just to point out, we excluded any  
3 transactions that would not disclose these target products,  
4 last twelve months revenue.

5 Q Ms. Stretton, let me ask you the same question as I did  
6 before. Are you confident that these twenty-seven precedent  
7 transactions represent the universe of all relevant precedent  
8 transactions to be included in your analysis?

9 A And, again, if there were more companies that had  
10 disclosed revenue, not every company who makes an acquisition  
11 before using information publicly. There may be some more  
12 that we would add. But they did meet the criteria because  
13 the information is not disclosed. Therefore, we wouldn't  
14 have a number to compare the enterprise value to last twelve  
15 months revenue.

16 Q Ms. Stratton, can you please let us know what Piper  
17 Sandler concluded was the result of its precedent  
18 transactions analysis?

19 A Yes, we came up with a range from \$220 million to \$249  
20 million with a midpoint of \$234.

21 Q Thank you.

22 MR. FRIEDMANN: And, Ms. Dougherty, if we can move  
23 back to Slide 4 again, please? Thank you.

24 BY MR. FRIEDMANN:

25 Q Ms. Stratton, can you now please describe the third

1 methodology that you have that Piper Sandler performed, the  
2 discounted cash flow analysis?

3 A Yeah. If you want to go page 10 that is the page that  
4 has the discounted cash flow analysis.

5 We performed a discounted cash flow analysis by bidding  
6 the projections of the company together to get to a free cash  
7 flow. You can see in the bottom of the screen. The present  
8 value, those four cash flows with your rated average cost of  
9 capital. And then you add the present value of a terminal  
10 value.

11 To come up with a terminal value, we used the  
12 perpetuity growth method. The perpetuity growth rate that we  
13 used, as you can see here, is a range from zero to  
14 (indiscernible) 5 percent. And the rated average cost of  
15 capital we used was 18.8 percent. I'm sorry, we used a range  
16 from 17.8 to 18.8.

17 Q Ms. Stratton, to what extent does Piper Sandler's DCF  
18 take into account the debtors' anticipated future profits and  
19 anticipated future performance?

20 A As you can see in this net revenue, the numbers jump  
21 quite a bit so this is all of the -- this is from the  
22 company's projections. And what they believe they will  
23 change over the next couple of years with their existing  
24 commercial products.

25 Q And the projections that you're using, Ms. Stratton,

1 were those prepared solely for the purpose of debtors'  
2 Chapter 11 filing?

3 A No, they were not.

4 Q What else were they used for, to the best of your  
5 knowledge?

6 A They were used as the company's -- this was slightly  
7 changed before I would say for the year -- the projections  
8 are based on projections that were the company's 2020  
9 budgets, so it was approved by the board to be used for  
10 various company internal policies. It was also used for the  
11 financing and equity raising.

12 Q And, Ms. Stratton, I see you have a three-year  
13 projection period that you've used. Is that the right period  
14 of time, in your view?

15 A It's three and a half years, but yes. The  
16 pharmaceutical industry is subject to a competition, change  
17 in technology. It would be very difficult to project beyond  
18 this period of time. And this is a reasonable projection  
19 period to which we would say that these projections are  
20 reasonable.

21 Q And, Ms. Stratton, what were the results of Piper  
22 Sandler's discounted cash flow analysis?

23 A Using that range, it is \$202 million to \$257 million  
24 with a midpoint of 226.

25 MR. FRIEDMANN: And, Ms. Dougherty, if we go back

1 to Slide 5, please?

2 BY MR. FRIEDMANN:

3 Q And, Ms. Stratton, I see that on this slide it's  
4 showing the three methodologies that you used and then  
5 there's a fourth column as well labeled, "Weighted  
6 Illustrative Enterprise Value Range," can you please explain  
7 what that is?

8 A So when you do your valuation not every valuation  
9 approach -- not one method is more accurate than others.  
10 They all have some downsides. So the most appropriate way to  
11 look at a total valuation is to weight them so that you get  
12 to a weighted -- a weight of all of the valuation techniques.

13 Q Ms. Stratton, if you can just explain in a little bit  
14 more detail why wouldn't you just take one of these  
15 methodologies and, perhaps, pick the one that best shows what  
16 your -- you know, what someone may want to approve and,  
17 instead, why are you doing this weighted average of all  
18 three?

19 A So each method has its own downside or positive  
20 attribute. The public comparable method sometimes you may  
21 not have the most comparable companies that you're looking  
22 at. It's also a valuation at a point in time, using the  
23 stock prices and information from those public companies on  
24 one date.

25 The precedent transactions, again, you may not have the

1 comparability in each of the transactions. In this case, for  
2 lack of public release information, may limit your total  
3 universe of transactions.

4 And, finally, a discounted cash flow analysis is  
5 subject to a lot of assumptions, anyone of which could alter  
6 your conclusion by a lot. It's generally better for steady  
7 and predictable industry which this one is not  
8 (indiscernible) predictable.

9 Q I see here, Ms. Stratton, that Piper Sandler chose to  
10 assign the result of each valuation methodology a 33 percent  
11 weight. Can you explain that?

12 A So when weighting a different valuation method, you  
13 have to take in those different downfalls and consider what  
14 the appropriate weighting is. It's not always 33 percent for  
15 each method. Sometimes, you might weight one method more.

16 In this case, we felt that all three methods were  
17 valid, all three methods had positive attributes and negative  
18 attributes and that each should be taken equally and is  
19 waiting for the conclusion on the value range.

20 Q And, Ms. Stratton, what were the results of Piper  
21 Sandler's weighting calculation?

22 A The range for the final conclusion is 210 million to  
23 243 million with a midpoint of 225 million.

24 Q Ms. Stratton, are the results of Piper Sandler's June  
25 2020 valuation analysis the only data point that you and your

1 team considered in connection with its valuation analysis?

2 A No, it is not.

3 Q To what extent, if at all, did Piper Sandler also  
4 consider the outcome of debtors' efforts to refinance their  
5 funded debt?

6 A So this is a, you know, a valuation exercise. Market  
7 testing is a reality check and in that reality check we  
8 determine that the value that the market had come up with in  
9 that (indiscernible) and debt rating was 197 million, so it  
10 gave us more comfort in the range and in each of our  
11 valuation methods.

12 MR. FRIEDMANN: And if we can turn to -- sorry.

13 BY MR. FRIEDMAN:

14 Q Ms. Stratton, is what you just described is that what  
15 is commonly called a market test?

16 A Yes. Again, valuation is an exercise. It's when you  
17 actually go to sell a company or, in this case, market the  
18 company with the equity that you see what the true value may  
19 be. While it's not a valuation method, it's a factor into  
20 our final conclusion as we determine this is a very good  
21 reality check.

22 Q In your experience, Ms. Stratton, are the results of a  
23 market test like this helpful as an indicator of what an  
24 enterprise's value may be?

25 A Yes, it is.

1 MR. FRIEDMANN: Ms. Dougherty, please move over to  
2 page 3, please of the presentation?

3 BY MR. FRIEDMANN?

4 Q Ms. Stratton, can you please explain or the court what  
5 this slide is showing?

6 A Since you are dealing with a public company you do have  
7 the implied market valuation based on its market  
8 capitalization. I would say usually with a public company  
9 that's distressed we usually have a valuation (indiscernible)  
10 lowers on the market. Each year we actually have a value  
11 (indiscernible) above the market.

12 So I think this was also a good reality check for as  
13 you see here the stocks trading is at 629 with 82 cents per  
14 share. We added the market capitalization to the net debt  
15 and there was an implied enterprise value from the market as  
16 of 6/29 of 215.4 million.

17 Q And why did you pick the stock price as of June 29th,  
18 2020 for this analysis, Ms. Stratton?

19 A Our valuation was of June 29th so it had the public  
20 comparable information as of 6/29. The precedent  
21 transactions are all as of 6/29 and the information used is  
22 the discounted cash flow and the weight average cost of  
23 capital are also as of 6/29.

24 Q Okay. Ms. Stratton, why didn't you simply incorporate  
25 the results of your prepetition market valuation into your



1 overall enterprise valuation?

2 A Again, are you -- it's unique here and that it's  
3 actually lower than our conclusion, but often times it's  
4 higher simply because the market didn't have all the  
5 information that these professionals do or understand the  
6 distress process.

7 Q So what value, if any, does this prepetition market  
8 valuation have in connection with your enterprise valuation?

9 A It shows that in this case even without understanding  
10 distress the market value of the company lower than Piper  
11 concluded the value was.

12 MR. FRIEDMANN: And, Ms. Dougherty, if we can go  
13 back to page 5? Thank you.

14 BY MR. FRIEDMANN:

15 Q Do you recall, Ms. Stratton, that counsel for the  
16 opposing stockholder at the equity committee hearing asked a  
17 number of questions about whether the result of some of the  
18 parts valuation rather than enterprise valuation might, in  
19 some way, undermine your enterprise valuation analysis?

20 A Yes.

21 Q And since the equity committee hearing has Piper  
22 Sandler done anything to address or investigate those  
23 concerns that were raised by the opposing stockholders?

24 A Yes. We conducted a (indiscernible) of the parts  
25 valuation analysis.

1 Q And what were the results of that analysis?

2 A The results were 219.2 million.

3 Q Okay. And can you explain -- I probably jumped ahead a  
4 little too much. Can you explain for the benefit of the  
5 court as well as the stockholders that are online here  
6 exactly what a some of the parts analysis is?

7 A Some of the parts is appropriate when you have many  
8 business lines or (indiscernible) products. It's not always  
9 relevant. We did not think it was relevant here. But it may  
10 be relevant in other companies or other transactions.

11 Q So why also didn't Piper Sandler do this valuation  
12 analysis back in June like in all the other analyses?

13 A So, as I explained in the market approaches, that's a  
14 public trading comparable. There's no precedent transaction.  
15 The metric used in this industry is revenue. So it is  
16 duplicative. In our exercise, we actually took the last  
17 twelve months (indiscernible) revenue, so last twelve months  
18 (indiscernible) revenue) and the last twelve months  
19 (indiscernible) or FINRA revenue and times it by the  
20 precedent assets median multiple to come up with that value  
21 conclusion.

22 So it's highly duplicative because the sum of those  
23 revenues is the same revenue as a going concern valuation.

24 Q Okay. And what multiple did you use?

25 A 3.1 times which is the median and the precedent asset

1 transaction.

2 Q Okay. And I know you answered this already, but what  
3 did you say was the result of your sum of the parts analysis?

4 A 219.2 million.

5 Q To what extent does that take into consideration a  
6 value that was ascribed by Piper Sandler for the VI-0106 drug  
7 that heard so much about at the equity committee hearing?

8 A It does not ascribe any value to that.

9 Q Why not?

10 A We still believe that it is a speculative asset. So,  
11 that does not include any value for VI-0106.

12 Q Can you explain a little bit more specifically why you  
13 reached that result?

14 A So, I think in my declaration it states that, I would  
15 say, Denida [phonetic] had and I had to give a value to VI-  
16 0106 it would be no more than \$1 million dollars which would  
17 then get me to Q-100 20 million point two million to 220.2  
18 million. That is because that is what the company paid for  
19 this asset in January of 2017 and thus far have no new  
20 efficacy data.

21 Q Ms. Stratton, if you absolutely had to assign some  
22 value to VI-0106, like I can imagine that, you know, someone  
23 would pay something for it. Would you be able to give it  
24 some kind of value in a sum of the parts analysis?

25 A Yes. Up to one million.

1 Q Okay. And why not more than that?

2 A The asset is not in a development stage where you would  
3 say, and especially pharmaceuticals, is value inflexion. It  
4 is in phase one. It has some safety data. It does not have  
5 any efficacy data or how the drug works so it can be used.  
6 They have not started any phase two trials for this  
7 formulation or for the classes that they are targeting.

8 So, there is no new information since they purchased  
9 the assets.

10 Q Ms. Stratton, during the time that Piper Sandler has  
11 been engaged as debtor's investment banker has anyone  
12 contacted you about purchasing any of the company's assets?

13 A Yes.

14 Q And has any of those interested parties approached you  
15 about potentially acquiring this VI-0106 drug?

16 A No.

17 Q Are you aware as to whether or not debtors have ever  
18 received any offers to buy the VI-0106?

19 A It's my understanding that Mr. Chlavin had submitted an  
20 offer to purchase VI-0106.

21 Q Do you know when that was?

22 A I believe it was last week.

23 Q And what do you know about Mr. Chlavin's offer?

24 A That he has proposed a purchase price of \$1 million  
25 dollars.

1 Q Do you know anything else about his offer?

2 A I believe its contingent. So, it's not a fully  
3 committed offer or final offer. It would take some work in  
4 order for that to be a final and committed offer.

5 Q Does Mr. Chlavin's proposed purchase price of \$1  
6 million dollars reflect a market test, so to speak, of what  
7 debtors would ultimately realize from such a sale?

8 A I believe it may, yes.

9 Q So, if debtors have now received an offer to purchase  
10 Vi-0106 for \$1 million dollars should you be adding that to  
11 your sum of the parts analysis?

12 A Yes. And, coincidentally, my million dollars wasn't  
13 based on his offer. We did that sum of the parts prior to his  
14 offer. Again, that would make it 220.2 million.

15 Q Okay. I asked you earlier, Ms. Stratton, about some of  
16 the points that Mr. Ahmadi [phonetic] made in the August 9th  
17 letter that was submitted to the court as part of Mr.  
18 Makosky's objection. Do you recall that?

19 A Yes.

20 Q And do you recall Mr. Ahmadi suggesting that Vi-0106  
21 has significant value and that Piper Sandler failed to  
22 include it in its valuation analysis?

23 A Yes, I do.

24 Q And do you recall Mr. Ahmadi pointing to two  
25 transactions in particular that he believes demonstrates Vi-

1 0106's value?

2 A Yes, I do.

3 Q And with respect to the first of those transactions do  
4 you recall it being a September 2018 transaction between  
5 MannKind Corporation and United Therapeutics for the rights  
6 to develop MannKind's Trade C [phonetic]?

7 A Yes.

8 Q In your view, Ms. Stratton, do you believe that the  
9 MannKind transaction, in fact, demonstrates that VI-0106 has  
10 significant value that in retrospect Piper Sandler should  
11 have included in its valuation analysis?

12 A I think it's not an appropriate transaction and  
13 irrelevant to VI-0106.

14 Q Why is that?

15 A So, I will explain the transaction because the one area  
16 here is it is a phase one asset. The reason that United  
17 Therapeutics bought a phase one asset for value was it is a  
18 different method of delivery for the drug Treprostinil.  
19 Treprostinil is already approved for the treatment of PAH  
20 and, in fact, United Therapeutics has the commercial drug in  
21 the market using Treprostinil to treat PAH.

22 So, by making this acquisition they, one, took out a  
23 competitor in their drug which they thought had a superior  
24 method of delivery and, two, they also have the rights for  
25 this method of delivery not only for Treprostinil, but also

1 for other drugs in their portfolio.

2 Q Ms. Stratton, let me also ask you about the other  
3 transaction that Mr. Ahmadi pointed out. That is, if you  
4 recall, was a November 2018 transaction between Arena  
5 Pharmaceuticals and United Therapeutics for Ryland [phonetic]  
6 -- Relling Tag [phonetic], I believe. Is that correct?

7 A Yes.

8 Q And do you believe, Ms. Stratton, that the Arena  
9 transaction demonstrates that VI-0106 has significant value  
10 that Piper Sandler should have included in its valuation  
11 analysis.

12 A The -- no, I do not.

13 Q Why is that?

14 A The purchase of Relling Tag was for a drug that had  
15 gone through phase two safety and efficacy data. So, it's at  
16 very different point in its development stage as well as its  
17 now starting phase three.

18 Q Ms. Stratton, do you recall that counsel for the  
19 opposing stock holders at the equity committee hearing asked  
20 you a number of questions concerning whether or not Piper  
21 Sandler had endeavored to determine whether the debtor's  
22 enterprise value had perhaps increased as of that June 29th,  
23 2020 date?

24 A I do.

25 Q And since the equity committee hearing has Piper

1 Sandler done anything to either address or investigate those  
2 concerns that were raised?

3 A Yes, we have.

4 Q Can you explain for the court what you have done?

5 A We updated all of the information in the public trading  
6 comparables as of August 11th. We reviewed to make sure  
7 there were no new precedent transactions that have been  
8 announced. We updated the (indiscernible) average cost of  
9 capital calculations for the DCF analysis. And had a  
10 discussion with the management team on whether the  
11 projections should change either positive or negative based  
12 on any new information.

13 Q What was the result of your team's work?

14 A It had a mid-point rated enterprise value range of 231  
15 million.

16 Q So, am I correct that's about, looking at the chart we  
17 have up here, \$6 million dollars more than the mid-point of  
18 the illustrative enterprise value range you had in your  
19 initial enterprise valuation?

20 A That's correct.

21 Q Can you explain for the court what you understand to be  
22 the primary causes of that \$6 million dollar increase in the  
23 mid-point?

24 A There's two main issues that are outside of the  
25 company:



1           One is in the public trading comparables there are a  
2 few companies that have traded a little bit higher as well as  
3 a few companies who have higher net debt which increases  
4 enterprise value. So, the multiple in public trading  
5 comparables was slightly higher.

6           The other change is that we used the Duff & Phelps risk  
7 free rate in our weighted average cost of capital. And in  
8 July they provided guidance that decreased the risk-free rate  
9 from three percent to 2.5 percent.

10 Q       In your view is the observed \$6 million dollar increase  
11 material?

12 A       No, it is not.

13 Q       Why not?

14 A       It's a very small percentage of the total range and not  
15 a large movement from our mid-point.

16 Q       Okay. Ms. Stratton, we've been going for a little  
17 while now and we've thrown a lot of numbers out at the court.  
18 So, I thought maybe we could briefly just run through and  
19 summarize them for everyone's benefit, probably.

20           Let me just run through from the top. Can you remind  
21 us what the mid-point of Piper Sandler's enterprise valuation  
22 range was? That will be the easiest one because its right up  
23 there, I think.

24 A       225 million.

25 Q       And what we just spoke about, what were the results of

1 Piper Sandler's updated valuation analysis?

2 A 231 million.

3 Q Okay. And we spoke earlier about the prepetition  
4 market valuation. What was the result of that?

5 A 215 million.

6 Q Okay. And then we also talked about the sum of the  
7 parts analysis. What were the results of that analysis?

8 A 220 million.

9 Q That is with including VI-0106?

10 A That's correct.

11 Q Okay. And then, finally, what were the results of the  
12 market test?

13 A 197 million.

14 Q Okay. Ms. Stratton, I'd like to ask you a couple  
15 questions about some of the issues that came up in the  
16 supplemental objection that was filed by one of the  
17 stockholders, Mr. Dijkstra.

18 Have you had an opportunity to review his two  
19 supplemental objections since you filed your declaration?

20 A Yes, I have.

21 Q Okay. So, in the first of those supplemental  
22 objections Mr. Dijkstra, do you recall him suggesting that  
23 Piper Sandler failed to consider the value of a compound  
24 called Ascomycin in its valuation analysis?

25 A Yes, I do.

1 Q How do you respond to Mr. Dijkstra's concerns with  
2 respect to Ascomycin?

3 A My understanding of Ascomycin is it was part of the  
4 purchase when the company purchased VI-0106. So, they paid  
5 \$1 million dollars for both the Ascomycin and VI-0106. The  
6 company has never intended to develop Ascomycin. They  
7 believe that VI-0106 is superior, but as it was offered as a  
8 package they didn't see any reason not to take it.

9 Q Do you know, Ms. Stratton, from your discussions with  
10 company management or the board as to the extent to which the  
11 company has invested any money in the development of  
12 Ascomycin?

13 A There has not been any money spent in the development  
14 of Ascomycin.

15 Q And do you recall Mr. Dijkstra also suggesting that  
16 Piper Sandler failed to consider a number of the debtor's  
17 granted and pending patents?

18 A Yes.

19 Q How do you respond to that concern raised by Mr.  
20 Dijkstra?

21 A We did consider them in our various valuation methods.  
22 Do you want me to go further on that? We would say it is not  
23 unusual and, in fact, very common for pharmaceutical  
24 companies to obtain a variety of patents to protect their  
25 commercial products. The other patents that he has listed or

1 given the information on relates to the existing commercial  
2 products.

3 To the extent that they protect those markets or those  
4 applications it is reflected in the company's projections  
5 which are used in the discounted cash flow analysis.

6 Q Ms. Stratton, I'd like to ask you about some of the  
7 other criticisms of your work by Dr. Ahmadi in his letter  
8 that was attached to Mr. Makosky's objection. In particular,  
9 do you recall, Ms. Stratton, that Mr. Ahmadi claimed that  
10 because VI-0106 has obtained orphan drug status it could  
11 qualify for fast track breakthrough therapy designation?

12 A Yes.

13 Q And I think before I ask any other questions why don't  
14 we, for the benefit of everyone, in particular the court, can  
15 you explain what orphan drug status means?

16 A Yes. Orphan drug status is often awarded by the FDA to  
17 pharmaceutical companies who are pursuing therapies for rare  
18 diseases. Knowing that it is a smaller addressable market  
19 they get certain tax incentives and most importantly eligible  
20 for up to seven years of exclusivity upon approval in the US.  
21 And (indiscernible), but in the EU of similar programs who  
22 would have ten years of exclusivity upon approval.

23 Q And can you also explain what a fast track designation  
24 is?

25 A So, the FDA has many other programs including fast

1 track, breakthrough technology, et cetera, or breakthrough  
2 therapy. Those can be applied for after an IMB is filed and  
3 after there is some positive phase two data in which the FDA  
4 thinks it is best for the public for those drugs to be fast  
5 tracked.

6 Q And are those two programs, the orphan drug status and  
7 the fast track breakthrough therapy designation, how, if at  
8 all, are those two tied together?

9 A They're not tied together at all.

10 Q So, if a drug has obtained orphan drug status does that  
11 in some way accelerate its ability to, you know, qualify for  
12 the fast track breakthrough program?

13 A The orphan drug status relates to the disease. Again,  
14 the FDA will look at the particular disease and if there's  
15 already therapies in place if it's better than others in the  
16 market. So, once you have phase two data and get a fast  
17 track that's not related; although, I imagine more orphan  
18 drugs obtain fast track approval than others.

19 Q Okay. And is a drug entitled to accelerate approval  
20 simply because it's an orphan drug?

21 A No.

22 Q Ms. Stratton, I now want to turn to some of the issues  
23 regarding NOL's. You understand that certain of the opposing  
24 stockholders and I believe also in Mr. Ahmadi's letter have  
25 criticized Piper Sandler for failing to account for the value

1 of debtor's NOL's in its valuation analysis.

2 A Yes.

3 Q What is your response to that criticism?

4 A That's not true.

5 Q Can you elaborate on that?

6 A Yes. So you can't just sell an NOL. So, it wouldn't  
7 be an excess asset that you could sell. And in the case of  
8 the discounted cash flows we applied the NOL's in the  
9 projection period. So, while the company would have had  
10 taxable income in 2021, 2022, and 2023 we applied the net  
11 operating losses. So, they are not paying taxes.

12 In addition, when we determined the gross factor for  
13 our perpetuated growth method, we used a mid-point of 2.5  
14 percent to account for those NOL's. Had we not had NOL's we  
15 would have used a more negative gross factor.

16 Q So, when Mr. Ahmadi asserts that the value of debtor's  
17 NOL's is \$235.5 million dollars do you agree with that  
18 assessment?

19 A I do not.

20 Q Why not?

21 A First, he used the wrong rate. So, again, federal  
22 NOL's need to be applied to federal taxable income. State  
23 NOL's need to be applied to state taxable income. He used a  
24 rate of 25.7 percent. We would apply a federal rate to the  
25 federal taxes, more like at 21 percent, and a five percent

1 rate to the state NOL's.

2 In addition, even if you use the right tax rates to  
3 come up with a value, you're ignoring the time value of  
4 money. This company can't use all of those NOL's this year.

5 Q Ms. Stratton, Mr. Ahmadi also suggests, in his August  
6 9th letter, to the court that if the debtor's management team  
7 had simply offered 30 million VIVUS shares at \$9 dollars per  
8 share back in November 2019 it could have raised enough money  
9 to pay-off all of its funded debt. Do you recall that?

10 A Yes, I do.

11 Q Do you agree with Mr. Ahmadi's suggestion?

12 A No, I don't.

13 Q Why not?

14 A First of all, he obtained that \$9 dollars from a target  
15 share price of the (indiscernible) report. So, at the time  
16 the company's actual share price was \$3.20. So, I think it's  
17 completely unreasonable to have an equity offering at three  
18 times your market value. In fact, it would normally be a  
19 discount to your market value.

20 Q Ms. Stratton, are you aware of any precedent where a  
21 company has done something like this, offered shares at three  
22 times its market price in order to raise --

23 A No.

24 Q Ms. Stratton, Mr. Ahmadi also has a calculation at the  
25 end of his letter. Do you recall seeing that where he

1 tabulates his overall value of the debtors?

2 A Yes.

3 Q What do you understand his method to be?

4 A He took the Piper valuation range of 210 to 243 and  
5 added his value for NOL's of 235.5 and took a range of  
6 valuation for the VI-0106 from 84.5 to 1.2 billion and added  
7 to get to his total range.

8 Q Do you agree with his methodology and his calculations?

9 A No.

10 Q Why not?

11 A He -- well, one, we went through why that NOL is not  
12 valued at 235 and it also double counts because we did  
13 include the NOL's in our discounted cash flow. In addition,  
14 I don't believe that there should be any value ascribed to  
15 VI-0106. In fact, he took two transactions that are very  
16 dissimilar to VI-0106 even if you agreed that you should  
17 provide value to come up with his range.

18 Q Ms. Stratton, did you attend Mr. Ahmadi's deposition?

19 A I did.

20 Q And do you recall Mr. Ahmadi describing an enterprise  
21 valuation as a simple analysis that, that it's just a matter  
22 of adding two plus two?

23 A I do.

24 Q Do you agree with Mr. Ahmadi?

25 A I do not.



1 Q Why not?

2 A While this presentation has the summary of our  
3 valuation analysis and it may look like we just did math it  
4 takes hours and hours of discussions to know the industry, to  
5 know the right metrics, to think about transactions. There  
6 is a lot of theory that you must know and discuss. My team  
7 spent countless hours going through information to come up  
8 with this conclusion.

9 MR. FRIEDMAN: Thank you, Ms. Stratton.

10 Your Honor, I have no further questions for Ms.  
11 Stratton at this time.

12 THE COURT: Thank you.

13 I would like to take five minutes and then we will  
14 do cross.

15 Ms. Stratton, during this time please do not  
16 discuss your testimony with anybody. Thank you.

17 (Recess taken at 3:08 p.m.)

18 (Proceedings resumed at 3:15 p.m.)

19 (Proceedings resumed in the middle of testimony)

20 . . . No.

21 Q Okay. Would you have any reason to disagree, and I  
22 will just represent to you that I did that I did that and I  
23 came up with the number of 3.6.

24 A I have not done it, so I couldn't tell you.

25 Q Okay. I would ask you to accept my representation. It

1 is math and people can check, and I'm sure they will if I've  
2 done it wrong. But I did that calculation and came up with a  
3 mean of 3.6. Obviously, if you have a different multiplier,  
4 a higher multiplier and apply it to the 2020 estimated  
5 revenue of 77.2 million you're going to come up with a much  
6 higher valuation number, right?

7 A In theory, yes.

8 Q Well not in theory if you actually used the higher  
9 number and apply it to the 2020 estimated revenues you will,  
10 in fact, come up with a higher valuation number?

11 A Yes.

12 Q Again, I'm not going to ask you to do the math  
13 necessarily. I would be happy for you to do it if you would  
14 like to, to check me, but would that use of the 3.6 million  
15 number -- I'm sorry, 3.6 multiplier with a 77.2 million  
16 estimated revenue for 220 produce about 278 million in value.  
17 Do you have any reason to disagree with my math on that  
18 point?

19 A No.

20 Q So, we go back to Page 5 again. And the multiplier  
21 numbers were applied against 2020 estimated revenue of 77.2  
22 million, right?

23 A Yes.

24 Q And is 2020 a fair representation of the revenue  
25 potential for VIVUS considering the year is a year in which

1 the company has been in bankruptcy for a few months, two  
2 months at least, the impact of COVID-19 and also the  
3 company's efforts to restructure prior to the bankruptcy  
4 case?

5 A This is the general accepted method. It's to use the  
6 2020 year. I don't know what we're suggesting we would do  
7 differently. We don't believe that the bankruptcy has  
8 affected the company's operations.

9 Q Well, your valuation depends on revenue-based model. I  
10 heard you say that you disagreed with Mr. Ahmadi's EBITDA  
11 based valuation because revenues was a better marker for  
12 valuation purposes, right?

13 A Yes.

14 Q Okay. So, I think we could disagree, but maybe we  
15 agree that 2020 would not be a great revenue year for the  
16 debtor. And I think that is possibly shown by the fact that  
17 the 2020 estimated revenues jumps from 77 million to a 2021  
18 estimated revenue figure of almost 120 million, correct?

19 A Yes.

20 Q And, obviously, in your calculation, you know, once  
21 you've done all the work in selecting the public companies it  
22 is in some essence a math problem at that point and we can  
23 agree also that if you use a higher revenue figure with  
24 whatever multiple you are using you are going to have a  
25 higher valuation. That math will produce a higher number,

1 correct?

2 A Yes.

3 Q So, for example, if you use the 2.8 median multiplier  
4 and apply it to what the company anticipates earning for  
5 2021, which is only a few months from now, the beginning of  
6 it, my calculation, and I'll ask if you have any reason to  
7 disagree with it, 2.8 million times approximately 120 million  
8 results in a valuation of about \$334 million dollars.

9 A But you're not comparing it to the public trading  
10 comparable. So, if you argue that 2020 is a bad year for  
11 COVID -- because of COVID it would also be a bad revenue year  
12 for many of these other pharmaceutical companies that are  
13 listed on Page 7. So, you have to compare like years.

14 Q Well, except are you aware of whether any of these  
15 companies went through a bankruptcy case in 2020?

16 A Again, the bankruptcy has nothing to do with the  
17 revenues on this company.

18 Q Well that's your opinion, that's not a statement of  
19 fact, correct?

20 A The projections that the company put together started  
21 in November of 2019 and are based on the company's  
22 projections. There have been no alterations for bankruptcy.

23 Q What explains the jump in the estimated revenues in  
24 2020 of 77 million to 120 million in 2021? What are the  
25 factors that contribute to that pretty sizeable, I think, 60

1 to 70 percent jump in revenues?

2 A So, if you wanted to use 2021 revenues, which I would  
3 not suggest using. I would use the last column and we would  
4 take the estimated enterprise value to revenue for 2021. And  
5 if you apply it, you would apply that number to a lower  
6 multiple as you can see on my page. My informed opinion and  
7 valuation expertise I believe that 2020 is the right year to  
8 compare, but you can't compare apples to oranges.

9 Q Okay. But if you take the 2021 figure, the multiplier,  
10 rather, for 2021 of 2.3 and multiply it against anticipated  
11 2021 revenues of 120 million, again, its simple math that  
12 results in \$276 million dollars, correct?

13 A The company has not achieved that revenue.

14 Q Understood. And I understand that and I understand  
15 that the company hasn't achieved 77 million in 2020, yes. It  
16 might achieve more it might achieve less. Is that correct?

17 A Yes.

18 Q And just to go back to my simple math problem using the  
19 2021 \$120 million dollars and multiplying it by the 2.3  
20 multiplier which, again, is the median number, not a mean  
21 number which I think is a higher number, but using that  
22 simple calculation 2.3 times 120 million. I get 276 million  
23 as a product of that calculation. Do you have any reason to  
24 disagree with that math?

25 A That is just a math equation.

1 Q Right. So, you would agree with that?

2 A I agree with your math. I don't agree with your  
3 application.

4 Q Understood. But 276 million -- a valuation of this  
5 company at 276 million means that it's solvent, correct?

6 A Again, I don't agree with your application. So, I  
7 can't agree with the solvency question.

8 Q You're an expert witness so I can ask you  
9 hypotheticals. I am asking you hypothetically if this  
10 company has a \$276 million dollar valuation it would be  
11 solvent, correct?

12 A That is correct.

13 Q All right. So, let's turn to Page 9 -- I'm sorry, Page  
14 8 of your report. This is the selected precedent  
15 acquisitions. There are two charts showing the universe of  
16 selected precedent acquisitions. The chart on Page 8  
17 represents what?

18 A This represents the purchase of going concern  
19 companies.

20 Q Okay. And the chart on Page 9 represents what?

21 A The purchase of assets.

22 Q Okay.

23 A Specific drugs.

24 Q And with respect to the asset purchases how did you  
25 come up with the enterprise value numbers that appear on this

1 chart?

2 A It is based on company filings and company press  
3 releases of either the target or the acquirer.

4 Q Now that is -- these numbers are not the same as the  
5 consideration that is paid in that asset purchase, correct?

6 A I have not reviewed asset purchase agreements. I don't  
7 understand your question.

8 Q Well, in an asset sale you can have consideration for  
9 the sale of cash or assumption of debt or any number of other  
10 things that go into the purchase price for the assets, right?

11 A This is the implied enterprise value based on the  
12 information that we received. So, enterprise value would  
13 include debt assumed.

14 Q Well, all I am suggesting is the assumed enterprise  
15 value is not necessarily the same as what was paid for the  
16 assets, right?

17 A I am not understanding your point. The enterprise  
18 value should be what they paid for the assets.

19 Q Should be, but you don't know in all cases whether it  
20 was, in fact, what was paid for the assets?

21 A I believe that it is. I have no information to think  
22 that it is not.

23 Q But do you have any information that it is?

24 A I don't have each of the backup information for this in  
25 front of me. I would have to review the backup information,

1 but enterprise value means that is what the company paid or  
2 assumed in liability for the assets.

3 Q And, again, the median number 3.1 that's the multiplier  
4 that's used to derive value in your selected precedent asset  
5 purchase analysis, correct?

6 A We actually used a wider range here because we, in  
7 fact, have two sets of precedent transactions. So, one at  
8 3.1 and on Page 8 3.3. So, we used from 3 to 3.4.

9 Q Okay. And the application of the 3 to 3.4 produces  
10 your range and then from that you get the mid-point, correct?

11 A That is correct.

12 Q All right. So, for this calculation you used LTM,  
13 which is last twelve months, in calculation, not estimated  
14 2020 revenue, right?

15 A Correct.

16 Q And we're on -- for Ms. Dougherty we're on Page 5.

17 Why is LTM used for the precedent transaction?

18 A Because in a precedent transaction you likely don't  
19 what their estimate of revenue is. Again, you have to  
20 compare it like to like. None of these transactions are like  
21 at the dates of the transactions. They were done over time  
22 from 2015. So, the most comparable number is to look at  
23 these last twelve months of your target which is VIVUS versus  
24 the last twelve months of these companies that were sold or  
25 for the assets that were sold.



1 Q Okay. So, then, in effect, wouldn't this valuation be  
2 more accurately stated as being as of March 31st of 2020 as  
3 opposed to June 29th of 2020 or the effective date of the  
4 plan?

5 A Again, in valuation you make your valuation as of the  
6 date, which I think I misspoke earlier. It is 6/29/20. And  
7 you have to use the available information you have.

8 Q I understand, but what I'm saying is --

9 A The available information that we have on 6/29/20 was  
10 an LTM of 73.3. If you want to use the LTM as of 6/30, which  
11 I now know, it is lower.

12 Q Well how do you now know that?

13 A Because the company has completed its second quarter  
14 financial statement.

15 Q I'm sorry, I'm confused. I thought a little while ago  
16 I asked you what it was and you did not know. So, how did  
17 you come to know that?

18 A I don't have the exact number in front of me. I do  
19 know that that number is lower. If you remember in my  
20 testimony it's a couple million, but if you remember in my  
21 testimony, we refreshed the valuation. I don't have it in  
22 front of me. I just know that it was slightly lower.

23 Q I'm sorry, I didn't hear that very well. Your  
24 testimony about what you are referring to?

25 A I said we refreshed this analysis based on the

1 questions from the equity committee hearing a few weeks ago  
2 and I do know that we moved the LTM as of 6/30/20, again  
3 because that's the most updated information at the time, and  
4 it is slightly lower than the LTM revenue of 73.3 at 331.

5 Q Okay. So for the precedent transactions, again, the  
6 inputs of the multiplier would impact the valuation. If your  
7 multiplier is higher your value is going to be higher. Isn't  
8 that true?

9 A Yes.

10 Q And were market conditions considered in connection  
11 with any of the transactions on Pages 8 and 9?

12 A So, the reason that precedent transaction -- actually,  
13 one of the pros to using the precedent transaction analysis  
14 is that you have transactions over a period of time which  
15 incorporate different economic cycles, different capital  
16 market cycles. So, you actually have less of the issue that  
17 you do with a public comparable which is on one day.

18 Q Ms. Stratton, can you look at your declaration,  
19 specifically Paragraph 9 on Page 9?

20 A I'm sorry, Paragraph 9?

21 Q Actually, that's my mistake. It's Paragraph 9 on Page  
22 4. My apologies.

23 A Okay.

24 Q And you see that you state in the last sentence of that  
25 Paragraph 9, the valuation analysis, your Piper Sandler

1 valuation analysis is based upon, one, facts and conditions  
2 known and existing as of June 29th, 2020 and, two, financial  
3 projections provided by the debtor's management.

4 What financial projections did Piper Sandler use?

5 A They're the financial projections that are part of the  
6 disclosure statement.

7 Q Okay. Can you look at what you have been provided as,  
8 what I'll call, Chlavin Exhibit 2?

9 A Yes.

10 Q I would ask you to look at Page 5 of that exhibit,  
11 numbered Page 5.

12 A Okay.

13 Q And are those the financial projections you are  
14 referring to?

15 A So, I am -- I don't see financial projections on my  
16 Page 5 for Exhibit 2. Let me --

17 Q Well, what I'm looking at is its -- I'll identify it as  
18 Exhibit E to the disclosure statement. What I have is  
19 numbered Page 5, the numbers at the bottom. It's also  
20 labeled at the top its Page 228 of 235. And it should be --  
21 I don't know -- Ms. Stratton, I don't know if you're looking  
22 at the electronic exhibits or the book that I understand that  
23 debtor's counsel may have sent you.

24 A They printed the book for me. Okay. I'm sorry,  
25 there's a couple Page 5's in this section. I found it, yes.

1 Q Okay. You're right about that. I think it's the first  
2 Page 5. So, what I'm looking at now is, again, you have this  
3 page on the top it says Page 228 of 235. Are we looking at  
4 the same thing?

5 A Yes.

6 Q Okay. I'll ask the question again. Are these, the  
7 financial projections that you just referred to in your  
8 testimony and also are referred to in your declaration at  
9 Paragraph 9 as the ones that Piper Sandler relied upon in  
10 connection with its valuation analysis?

11 A Yes, it is.

12 MR. DEMMY: All right. Can we then turn, Ms.  
13 Dougherty -- I appreciate all your help. Would you turn to  
14 Page 10 of the presentation that is on the screen?

15 BY MR. DEMMY:

16 Q Is this the same as Page 5 from Exhibit E to the  
17 disclosure statement?

18 A Those numbers are based on the same projections.

19 Q But its not the same chart, correct?

20 A This has the revenue. It's not the same chart. The  
21 revenue, you can see, is the same.

22 Q I acknowledge that the revenue is the same, but almost  
23 none of the other numbers are the same correct? And even the  
24 categories of numbers and columns are not the same, right?

25 A That is correct.

1 Q Okay. So, did you use Page 5 from Exhibit E to the  
2 disclosure statement or did you use what is in your  
3 presentation that is on the shared screen right now?

4 A So, we used the projections for which a summary is  
5 contained on Page 5.

6 Q But there are numbers in your --

7 A There's not two sets of projections. There are numbers  
8 in ours that we obtained -- what you are saying, have you  
9 seen a set of projections. A set of projections would be  
10 much more than this chart on Page 5 if you had a full set of  
11 projections from the company. So, we used a full set of  
12 projections from the company. The summary of it is on Page 5  
13 and then on Page 10 of my analysis these are items that are  
14 pulled out of those financial projections that are the exact  
15 projections for which you see a summary of in the disclosure  
16 statement.

17 Q Okay. What I'm hearing from you is that the full set  
18 of projections that Piper Sandler relied upon don't appear in  
19 the disclosure statement and also don't appear in the report  
20 that we are looking at on the screen.

21 A It would not be common to provide a full set of  
22 projections in a disclosure statement.

23 Q Well, that wasn't my question. It's really a yes or no  
24 question. The full set of projections are not included in  
25 the disclosure statement, correct?

1 A No, they aren't.

2 Q And they're also not included in your presentation that  
3 we are looking at now?

4 A No, they aren't.

5 Q And what's in your presentation is markedly different  
6 then what is in the Page 5 -- I'm sorry, what's in your  
7 presentation is very different from the Page 5 of Exhibit E  
8 to the disclosure statement, correct?

9 A It's for a different purpose and the numbers that we  
10 need to do a discounted cash flow are different numbers that  
11 need to be disclosed into a disclosure statement.

12 Q Page 5 to Exhibit E of the disclosure statement near  
13 the bottom of the chart produces for each year 2020 estimated  
14 2021, 2022, 2023 an EBITDA number, E-B-I-T-D-A. Do you see  
15 that?

16 A Yes.

17 Q Is that the number that you used for your discounted  
18 cash flow analysis?

19 A The discounted cash flow does not use EBITDA. It uses  
20 the free cash flow as we have calculated on this page with  
21 these numbers on Page 10.

22 Q And is your free cash flow numbers, do they appear  
23 anywhere in Exhibit E to the disclosure statement or anywhere  
24 else in the disclosure statement to your knowledge?

25 A No, they do not.

1 Q And is free cash flow and EBITDA the same number or an  
2 analogous number?

3 A No.

4 Q How are they different?

5 A EBITDA is simply (indiscernible) interest taxes,  
6 depreciation and amortization. For a free cash flow that you  
7 would discount back as a (indiscernible) you need to use net  
8 operating profit after tax. Then you add changes -- you add  
9 depreciation and amortization. You add stock-based  
10 compensation. You would change less capital expenditures and  
11 a change in working capital.

12 Q Is it your testimony that the use of an EBITDA number  
13 is never appropriate in a discounted cash flow analysis?

14 A That's correct.

15 Q So, I take it then that you have never used EBITDA in a  
16 discounted cash flow analysis, correct?

17 A No. You would use free cash flow.

18 Q So, I take it that Piper Sandler did not do a valuation  
19 for VIVUS using EBITDA rather than free cash flow?

20 A No, we do not.

21 Q Was Piper Sandler involved in the creation of Exhibit E  
22 to the disclosure statement?

23 A It is based on -- it is the company's projections that  
24 we assisted in preparing the model for.

25 Q I'm going to take that as a no, you didn't assist in

1 the preparation of Exhibit -- the chart that is appearing in  
2 Exhibit E, isn't that correct?

3 A No. I'm saying we did. It is the company's  
4 projections that we assisted them. We assisted the company  
5 with their projections.

6 Q Okay. Did you review the chart that appears in Exhibit  
7 E to the disclosure statement before it was filed?

8 A Yes, I did.

9 Q Is that a note in the disclosure statement about the  
10 discounted -- the valuation being based on free cash flow as  
11 opposed to the EBITDA numbers?

12 A It's not relevant to the financial forecast. It is  
13 standard valuation in discounted cash flow.

14 Q But your valuation is based on the projections which  
15 are billed as being in Exhibit E to the disclosure statement,  
16 correct?

17 A That's correct.

18 Q Now I think you will recall testifying at the equity  
19 committee hearing that there was a presentation to the board  
20 of directors on or about July 3rd of this year at which Piper  
21 Sandler's valuation analysis was presented. Do you recall  
22 that?

23 A Yes.

24 Q And do you recall that board meeting on or about July  
25 3rd at which the valuation analysis was presented?



1 A Yes.

2 Q And was there any discussion with the board at that  
3 time about the company's statements from June 19th, 2020, the  
4 June 19th, 2020 presentation which is attached as Exhibit B  
5 to your declaration in the context of the valuation analysis  
6 that was being presented?

7 A There was no discussions tying those two together.

8 Q I'm sorry, I didn't catch that. There was no  
9 discussion --

10 A No.

11 Q -- and then you trailed off.

12 A I said no. There was no discussions about the  
13 company's corporate presentation and the valuation.

14 Q Okay. Thank you.

15 Prior to that board meeting was there any discussion  
16 about the company's June 19th, 2020 presentation?

17 A You mean that I was part of or the board discussed? I'm  
18 confused at the question.

19 Q Was there any discussion prior to that board meeting  
20 between Piper Sandler and the company about the company's  
21 June 19th, 2020 presentation?

22 A No.

23 Q Was Piper Sandler involved in any way in the  
24 preparation of the company's June 19th, 2020 presentation?

25 A No.

1 Q And you do also recall testifying at the August 7th  
2 hearing that in your mind there is a difference in revenue  
3 potential and projections. There is a difference in those  
4 two concepts?

5 A Yes, there is.

6 Q And in the preparation of its valuation analysis Piper  
7 Sandler did not adopt any of the statements in the June 19th,  
8 2020 company presentation about projected revenues for VI-  
9 0106 and Pancreaze, correct?

10 A We used the company's projections and we actually had  
11 quite a few discussions in that time frame about the  
12 company's projections and what they thought was appropriate  
13 and reasonable to achieve.

14 Q I appreciate that. I don't think that answered my  
15 question, though, which was that in your valuation analysis  
16 Piper Sandler did not adopt the revenue projections that the  
17 company included in its June 29th -- I'm sorry, June 19th,  
18 2020 presentation with respect to VI-0106 and Pancreaze.

19 A No.

20 Q Cause those revenue projections for those two products  
21 or potential products were much higher than what is  
22 ultimately included in the financial projections that Piper  
23 Sandler used, right?

24 A They are -- they were revenue opportunities. I don't  
25 think that they were exactly projections.

1 Q Okay. And with respect to Pancreaze, as I understand  
2 it, and correct me if I'm wrong, the company in its June  
3 19th, 2020 presentation placed the revenue projection or  
4 opportunity for Pancreaze at 100 million and the number that  
5 ultimately made its way into the financial projections was 68  
6 million, correct?

7 A Correct.

8 Q Now in a DCF analysis, the discounted cash flow  
9 analysis, if the 100 million had been used for Pancreaze as  
10 opposed to 68 million that would impact the valuation under a  
11 discounted cash flow analysis, right?

12 A Yes.

13 Q It would make the valuation go higher, right?

14 A Yes.

15 Q Can you estimate the magnitude of that increase if you  
16 use 100 million for Pancreaze as opposed to the 68 million  
17 that, in fact, was used in the projections?

18 A I couldn't do that for you right now.

19 Q I -- so, I appreciate that, but, you know, it would be  
20 helpful, I think, to understand at least within a range of  
21 reason. Not to say that I'm asking you for a precise  
22 calculation, but can you give us any indication of what a 32  
23 million jump in revenues would do to the value of the company  
24 under your discounted cash flow analysis?

25 A I'm sorry, it would be discounting back three and a

1 half years into the future. So, I would actually need to use  
2 my computer right now. I'm sorry I couldn't do it. There  
3 would be an increase. I can tell you there would be an  
4 increase. I can't tell you what the magnitude would be.

5 Q Do you think it would be a material increase?

6 A There would be an increase. I can't tell you if its  
7 material or not.

8 Q Do you think it would be more than the six million you  
9 testified about earlier as it increase?

10 A I'm really not sure. I guess I would also say if  
11 you're going to have higher revenue you would also have to  
12 offset it with an expense related to that higher revenue  
13 which are also not in the projections. So, I couldn't tell  
14 you the impact overall what an increase in Pancreaze's  
15 revenue would do. It's not as simple as the additional 30  
16 plus million discounted back.

17 Q I'm sorry, Ms. Stratton, I didn't catch that last  
18 statement at all.

19 A I said it's not --

20 Q Okay. I got that. It's not as simple as what I'm  
21 making it out to be is what you are saying?

22 A Yes.

23 Q Except that you acknowledge there would be an impact?

24 A Yes.

25 Q I would ask the same simple question with respect to

1 VI-0106. If there was any revenue that was attributable to  
2 VI-0106 in the next three years that would impact the  
3 discounted cash flow analysis, any revenue that could be  
4 projected now.

5 A That would be correct.

6 Q I think your answer to this would probably be it would  
7 be harder to understand the magnitude of that since you have  
8 less data about VI-0106, right?

9 A I do understand that it is very unlikely there would be  
10 any revenue in the next three years.

11 Q Notwithstanding what the company said in its June 19th,  
12 2020 corporate presentation that the revenues could be up to  
13 1.2 billion?

14 A I don't think that they meant in the next three years.  
15 I think that they meant at some point in the future upon  
16 approval of that drug.

17 Q Do you have any understanding as to what period of time  
18 the company was referring to in that presentation?

19 A I can tell you that even to get through a phase two  
20 they think that would be eighteen to twenty-four months. So,  
21 that is just for a phase two or to get good data within a  
22 phase two. So, it could take years before they have -- if  
23 they were to get this drug approved it could be years before  
24 it's approved and that is not within this projection horizon.

25 MR. DEMMY: I'm going to ask for Ms. Dougherty's

1 help again. I appreciate her helping me out. If you would  
2 put the Piper Sandler evaluation that we have been looking at  
3 back on the screen, please.

4 THE WITNESS: Yes. Sorry to purport, it seems I  
5 have lost my screen sharing permissions. I had a brief  
6 technical difficulty during your last line of questioning.  
7 It seems to have been disabled.

8 MR. DEMMY: Okay. We can go by paper. It's not a  
9 problem.

10 BY MR. DEMMY:

11 Q Ms. Stratton, would you take a look at Exhibit B to  
12 your declaration, please.

13 A Sorry, I got it back.

14 Q Perfect. Thank you.

15 So, I want you to go to Paragraph -- I'm sorry, not  
16 paragraph, but Page 11 please.

17 A Okay.

18 Q Ms. Stratton, the heading says WAC analysis, which I  
19 understand is a weighted average cost of capital which is one  
20 of the numbers you use in calculating discounted cash flow,  
21 correct?

22 A Correct.

23 Q All right. And at its heart a discounted cash flow  
24 valuation --

25 (Phone interruption)

1 THE COURT: Excuse me. Excuse me. People, please  
2 check to make sure that your phones are muted. I'm getting  
3 conversation.

4 Mr. Demmy?

5 MR. DEMMY: Yes. Thank you, Your Honor.

6 BY MR. DEMMY:

7 Q I know I had a magnificent question that was in  
8 midstream so I will try to recreate it.

9 Just to frame the next series of questions we can agree  
10 that a discounted cash flow valuation analysis is one in  
11 which a value is assigned to a company based on the present  
12 value of its anticipated future cash flows, right?

13 A Yes.

14 Q Okay. And to undertake a discounted cash flow  
15 valuation a discount rate must be applied against that future  
16 cash flow, right?

17 A Yes.

18 Q And Piper Sandler's use of a weighted average cost of  
19 capital is -- that's the discount rate that Piper Sandler  
20 used, right?

21 A That's correct.

22 Q Are there other formulations of discount rates that are  
23 used in discounted cash-flow valuations?

24 A This is using the capital asset pricing model. I think  
25 this is the standard for when you look at an enterprise

1 valuation of the company's cash flows.

2 Q Are there other formulations that are used for discount  
3 rates in a discounted cash flow analysis?

4 A Not that I have seen used on a regular basis. This is  
5 the one that is most used.

6 Q What other formulations are used, but less regularly in  
7 your opinion?

8 A I mean it's different for different -- let me put it  
9 this way. For an enterprise valuation this is the -- a  
10 weighted average cost of capital is the most appropriate to  
11 use. I couldn't off the top of my head think of some. I'm  
12 thinking of others for different reasons. Real estate  
13 appraisals use a different rate under the same concept as  
14 discounted cash flow, but we're looking at an enterprise  
15 valuation. Weighted average cost of capital is the most  
16 appropriate and most normally used.

17 Q Okay. I just want to be clear about this, you  
18 acknowledged that there are some other formulations that are  
19 used less regularly and you don't agree that they are most or  
20 more appropriate, but there are some other formulations used.  
21 I am just asking you if you can tell me what they are.

22 A I can't think of any right now. I am sorry.

23 Q Okay.

24 A This is almost always used.

25 Q Okay. So, if we look on the left side -- well, before



1 I ask you that can you tell me what the components of a  
2 weighted average cost of capital are just as a general  
3 matter?

4 A So, you have to find the cost of equity capital. You  
5 would find the tax adjusted cost of debt capital and apply to  
6 a capital structure to get to a weighted average cost of  
7 capital.

8 Q Okay. And I see on the right-hand side you have the 75  
9 percent and 25 percent which shows, I suppose, the ratio of  
10 equity to total capital and debt to total capital and to each  
11 other, in effect.

12 A Yes.

13 Q So, your anticipation is that going forward it will --  
14 well, let me ask you that question. Is that a going forward  
15 set of numbers that equity will be 75 percent of the capital  
16 and debt will be 25 percent of the capital of this company?

17 A So, actually in theory you are not supposed to use the  
18 company's actual capital structure. You use a hypothetical  
19 which could be it's the -- in this case we used the proxy of  
20 the market. So, if you actually went back to our public  
21 comparables page on Page 7 you see there's a column it says  
22 debt to total capitalization and you see the median is 25.9  
23 percent. This is using the market information for the  
24 theoretical long-term capital structure.

25 Q Is it improper to use the actual company being valued

1 its debt to equity ratios?

2 A Yes, unless that is in line with the market then yes.

3 Q So, in your testimony previously about the use of a  
4 median versus the mean would apply here I take it without  
5 having to ask you that specific question?

6 A Yes. We think its appropriate to use the median.

7 Q And that's simply an exercise of your discretion in  
8 undertaking this project, correct?

9 A It is widely used. Yes, it is.

10 Q And others might disagree and use a different number.  
11 They might use an average, right?

12 A It's possible.

13 Q And in using an average they might throw out the --  
14 like in the Olympics you throw out the high wins and the low  
15 wins and you do an average on that basis. Is that ever done  
16 in this kind of valuation modeling?

17 A It is our practice to use the median.

18 Q Is it ever done though outside of Piper Sandler's  
19 practice?

20 A Yes, it can be.

21 Q Okay. Can we go back -- oh, we're back. So, the risk-  
22 free rate of 3 percent, what does that reflect?

23 A This is the -- in the capital asset pricing model it's  
24 a formula -- excuse me for not being able to go through it  
25 right now, but one of the components is their risk-free rate.

1 This we typically use from Duff & Phelps. They're a  
2 valuation firm that publishes information for other groups to  
3 do valuations to use.

4 Q Does this number have anything specifically to do with  
5 the VIVUS or is it simply an industry number?

6 A It's an industry number. Not an industry, it's  
7 actually for any industry if you use a risk-free rate on an  
8 enterprise valuation. Many people use the Duff & Phelps risk  
9 free rate.

10 Q So, it's a market number, not an industry number?

11 A Yes. Correct.

12 Q Now what about the market risk premium. What does that  
13 relate to?

14 A It relates to the risk and the market over time, but  
15 represents the equity risk premium in the market over time.  
16 You can calculate it or you can obtain it from another  
17 source. We use Bloomberg. So, it is a market -- the market  
18 risk premium is also market. The theory behind it is a  
19 calculated number.

20 Q Again, this is a market number and not a number that  
21 relates specifically to VIVUS, right?

22 A That's correct.

23 Q And tell me what the beta is, what it means?

24 A The beta is if you have a beta of one then when the  
25 market moves the company would move the exact same portion of

1 the market. If it's more than one it moves more than the  
2 market, if it's less than one it moves less than the market.  
3 This is a, again, obtained from Bloomberg for the industry.

4 Q And what industry is that?

5 A Yes. For the pharmaceutical industry.

6 Q Okay. But, again, industry specific and not VIVUS  
7 specific?

8 A VIVUS is in the industry.

9 Q Right, but what I'm saying is that the beta number  
10 doesn't relate only to VIVUS. It relates to all companies in  
11 the industry. It's based on the industry, not on the  
12 company?

13 A Yes.

14 Q Okay. So, those three numbers together produce the  
15 cost of equity capital that you have there. Is that right?

16 A Correct.

17 Q Oh, I'm sorry, what about the size related equity risk  
18 premium. What does that refer to?

19 A So, once you get the cost of equity capital using the  
20 CAPM model you must make adjustments to the company if  
21 there's, you know, control issues. There's a lot of  
22 different things that you could factor in there. We chose the  
23 size related equity risk premium which, again, is published  
24 in a book and applied that to the adjusted cost of equity  
25 capital.

1 Q What is the size that is the concern with respect to  
2 size related equity risk premium. What is being referred to  
3 there?

4 A This is a smaller sized company then others in the  
5 industry.

6 Q Okay. So, the number goes up the smaller the company  
7 is?

8 A Yes.

9 Q And it goes down if the company is bigger?

10 A Yes or there may not be a number if the company is  
11 larger. I'd actually say its -- yeah.

12 Q And as I understand it none of those numbers in the  
13 cost of equity capital or to get to the adjusted cost of  
14 equity capital have anything to do with VIVUS on its own.  
15 Its either market or industry numbers?

16 A That's correct.

17 Q Okay. So, let's go to cost of debt capital. What is  
18 the cost of debt refer to?

19 A The cost of debt refers to what the company could  
20 obtain for the debt that we have put here as 25 percent.  
21 This is the tax adjusted rate they would be paying.

22 Q Is that based on what the company is actually paying as  
23 the cost of debt or some other number?

24 A No. We used the market that we obtained in our market  
25 test.

1 Q Why wouldn't the company's actual cost of debt  
2 financing be the cost of debt for that item?

3 A Because you're valuing the company on a date and all of  
4 these numbers must relate to the market today. And the  
5 market cost of debt for VIVUS today for first lien debt is 13  
6 percent.

7 Q When you say the market cost of debt for VIVUS today is  
8 13 percent what does that mean?

9 A That means that when Piper Sandler ran its debt process  
10 this is the rate that VIVUS could obtain were it to get a  
11 first lien debt today?

12 Q So, does that take into account the rate, perhaps, that  
13 VIVUS would be able to obtain after the plan has been  
14 confirmed and gone effective?

15 A Yes, it would.

16 Q How would it?

17 A If the -- it is our opinion that from June until after  
18 the confirmation date if the company went out to get a first  
19 lien debt based on the same projections that are used in the  
20 plan is the same projections that were used in our debt  
21 process the company would achieve a market rate of 13  
22 percent.

23 Q The company has exit financing, correct or has lined up  
24 exit financing as part of confirmation, right?

25 A Yes.

1 Q Do you know what the rate of that financing is?

2 A I believe it is 11 percent.

3 Q So, why wouldn't that rate be used? That is the actual  
4 rate that the company was able to obtain, right?

5 A Because that is not necessarily indicative of market.  
6 That is the rate that its future shareholder has determined  
7 it will charge for the financing.

8 Q Okay. Other people looking to do a valuation of the  
9 debtor might use that 11 percent. That would not be  
10 inappropriate, right?

11 A Again, I don't think it's a market rate. We actually  
12 have the benefit of going to the market so we know what the  
13 market rate for the cost of debt for this company is.

14 Q I appreciate that, but that wasn't my question.

15 My question was other people could disagree with you  
16 and use 11 percent because that is the actual rate of the  
17 financing going forward, right?

18 A Other parties may see a different market rate. All I  
19 can tell you is what we have done.

20 Q Okay. So, this is an area where Piper Sandler's  
21 discretion comes into play as to the application of a market  
22 rate for the cost of debt, right?

23 A Yes.

24 Q And that's in contrast to the other items we talked  
25 about, the risk-free rate, the market risk premium, the beta

1 and the size related equity risk premium which I understand,  
2 unless you tell me otherwise, that Piper Sandler had no  
3 discretion. It just looked at a source and plugged the  
4 number in.

5 A That's correct.

6 Q So, maybe this is nit-picky, but I'm going to nit-pick.  
7 You have the cost of debt at 13 percent, the tax shield of  
8 3.3. Shouldn't it be then 9.7 as the effective cost of debt?

9 A I'm sorry, it's probably a rounding error.

10 Q Okay.

11 A I understand.

12 Q I had to ask.

13 A Yes.

14 Q Generally, speaking --

15 A Actually, can I just say it's not a rounding error, but  
16 this is done in Excel. So, it just rounds up so you see  
17 where it is.

18 Q I understood that it was a rounding issue.

19 A Okay.

20 Q I appreciate the clarification though.

21 Generally speaking, all things being equal, a lower  
22 weighted average cost of capital produces a higher value in a  
23 discounted cash flow analysis, right?

24 A That's correct.

25 Q So, if some other expert valuation witness said, well,



1 we really should use 11 for the cost of debt or some other  
2 number, lower number, the weighted average cost of capital  
3 would increase under this analysis, right?

4 A Yes.

5 Q And the other area in which some discretion is  
6 potentially applicable is the debt to equity ratio numbers,  
7 right?

8 A Which is why we used the market rather than a  
9 theoretical number that couldn't be supported.

10 Q Right. And you used the median number as you testified  
11 a little while ago?

12 A Yes.

13 Q You talked a little bit earlier about market tests.  
14 Would you agree that the best methodology for an actual  
15 market test is a sale between a willing buyer and a willing  
16 seller?

17 A That is one market test. I think that there are  
18 different forms of market tests.

19 Q Do you know if the company's assets were marketed for  
20 sale as a going concern prior to bankruptcy?

21 A They were not.

22 Q Are you aware of whether there was any discussion about  
23 doing that?

24 A There was not.

25 Q Your declaration attaches a couple of reports by an

1 entity that you referred to already which is Zacks Investment  
2 Research. Are you familiar with Zacks and what it does?

3 A Yes.

4 Q If you can shorthand it for me, what does Zacks do?  
5 What services does it provide?

6 A Zacks is a research analyst firm that provides  
7 research to shareholders or to potential investors.

8 Q About what?

9 A About the price of a stock.

10 Q And in some way shape and form the price of the stock  
11 has some relationship to the value of that company, correct?

12 A Yes.

13 Q Do you know on what Zacks basis its research and its  
14 reporting to shareholders?

15 A I don't know what they base their research on.

16 Q Do you know whether Zacks had an agreement with the  
17 debtors in this case to provide these kind of services?

18 A I understand that from the exhibits that you provided.

19 Q You don't have any independent knowledge of that?

20 A I did not until I read that document.

21 Q And can you turn to exhibit, what I'll call, Chlavin  
22 Exhibit 13 in the documents that were provided to you. And  
23 is this the agreement that you're referring to? I just want  
24 to make sure we're on the same basis?

25 A Yes.

1 Q Now attached to your report is the June 9th, 2020 Zacks  
2 report. I think you attached it in the nature of rebutting  
3 or responding to Dr. Ahmadi's testimony or his letter. Do  
4 you recall that?

5 A Yes.

6 Q Do you agree that that was attached to your report?

7 A Yes.

8 Q I'll identify that for the record. It's Exhibit F to  
9 your declaration. And I think you testified about this a  
10 little earlier.

11 If you would turn to Page 4 of, I guess, the first full  
12 paragraph, perhaps the second paragraph on Page 4 --  
13 actually, I'm sorry, it's numbered Page 3, its Page 4 of the  
14 exhibit including the exhibit page.

15 A Okay.

16 Q Are you with me? The paragraph that starts under these  
17 assumptions our MPV model?

18 A Yes.

19 Q Did you have this information at the time you did your  
20 valuation analysis of the company?

21 A No. It's not appropriate to look at analyst reports  
22 when conducting an independent valuation.

23 Q Do you know whether or not the information included in  
24 this Zacks report is based upon information that the debtors  
25 were providing to Zacks?

1 A I would presume so. I do not know.

2 Q Did you include this or look at this report and the  
3 information in it about VI-0106 when you did your sum of the  
4 parts valuation that you testified about earlier?

5 A Yes, I did.

6 Q And I think you said this, you attributed no value to  
7 VI-0106 in that sum of the parts valuation, right?

8 A That's correct.

9 Q But you are aware that the Zacks report is saying that  
10 VI-0106 had a value of in excess of 84 million?

11 A It says, however, we note that this value is only  
12 appropriate after I and declarant in the start of the phase  
13 two trial as per our methodology. I believe this is a  
14 contingent value.

15 MR. DEMMY: I'm sorry, Your Honor. I'm trying to  
16 go back and forth and I'm trying to make sure I'm doing this  
17 as efficiently as possible.

18 BY MR. DEMMY:

19 Q Now with respect to net operating losses, Ms. Stratton,  
20 do net operating losses have any independent value apart from  
21 whatever impact they may have on, you know, the traditional  
22 valuation analysis?

23 A They can't be sold. So, no, they can only be used by  
24 the company and in certain circumstances.

25 Q If VIVUS acquired another company could the NOL's be

1 used to shield that other company's positive revenue that,  
2 otherwise, would be taxable?

3 A Under the right circumstances, yes.

4 Q And you're not a tax expert?

5 A I am not.

6 Q So, you're just recognizing that there are tax issues  
7 involved in that which I'm not aware of either. Is that  
8 true?

9 A Yes.

10 Q Was Piper Sandler involved in the effort to refinance  
11 the OW Biopharma debt?

12 A Yes, we were.

13 Q And what was the timeframe for that effort?

14 A Starting we were hired last October of 2019 all the way  
15 through in June, when it was apparent, we would not be able  
16 to obtain enough debt. And the other investment bank wasn't  
17 able to obtain enough equity to pay-off IEH in full.

18 Q Was there a moratorium at some point on efforts to  
19 refinance the IEH Biopharma debt?

20 A Yes.

21 Q What time period was that?

22 A From about middle of March and then we restarted  
23 discussion in April. We had discussions in the company about  
24 it in April.

25 Q Didn't that moratorium extend until June 1st?

1 A We had discussions about it with the company. We were  
2 planning on re-launching the effort. So, I'm not sure what  
3 you're getting at.

4 Q Well, it's a simple question. Did you understand that  
5 the moratorium (indiscernible) refinance the IEH Biopharma  
6 debt continued from mid-March to June 1st?

7 A I think there is actually a process of equity in April  
8 that we were not a part of. So, I don't know how I want to  
9 explain that, but, yes, we did not look for additional debt  
10 in our profile until June 1st again.

11 Q Okay. And coincidentally my next question was going to  
12 be about equity offering. Were you aware that VIVUS's board  
13 of directors authorized the company to try to sell  
14 approximately 11,000 -- I'm sorry, 11,500,000 shares on or  
15 about April 1st of this year?

16 A Yes.

17 Q And were you aware that or are you aware that the price  
18 proposed for those shares was a dollar sixty a share?

19 A I didn't know what the price was, but --

20 Q I'm sorry, your answer was you did not know?

21 A I was not aware of what the price was proposed to be.

22 Q Was Piper Sandler -- okay. That was my next question,  
23 was Piper Sandler involved.

24 Apart from involvement of the -- I think we were just  
25 talking about -- I'll ask you was Piper Sandler involved in

1 any way in the setting of the price for the shares that were  
2 to be offered starting April 1st?

3 A No.

4 Q Did Piper Sandler consider that offering at a dollar  
5 sixty a share which I will represent to you was the share  
6 price in its valuation analysis in any way at all?

7 A No.

8 Q Can we go to Page 3 of the presentation that remains on  
9 the screen? I appreciate that.

10 So, my question on this, about Page 3, relates to the  
11 subtraction of the cash and cash equivalents. Do you see  
12 that?

13 A Yes.

14 Q Does that represent -- well, I will ask it a different  
15 way; what does that represent? What does that negative \$31  
16 million dollar number represent?

17 A So, the definition of enterprise value is net debt plus  
18 equity value. So, you would subtract the cash you have on  
19 hand from the debt.

20 Q Okay. This is showing a negative cash balance. What  
21 does that mean?

22 A The loan balances are positive. So, to show that that  
23 is subtracted from those loan balances it's a negative  
24 number. So, the company had \$31 million dollars of cash and  
25 cash equivalents on hand as of 6/29/20.

1 Q Okay. So, in reality that's a positive number, but for  
2 the purposes of this analysis it shows as a negative number.

3 Is that right?

4 A That's correct.

5 Q It doesn't mean that the company had no cash at that  
6 time?

7 A No. I just mean that to get to net debt we were taking  
8 positive numbers and we subtracted out that number to show  
9 its negative, to show the sum there.

10 Q Is it attempting to show that the amount of the debt is  
11 more than the assets?

12 A No. Net debt, the definition of net debt is the long-  
13 term debt left the amount of cash on hand. The enterprise  
14 value is a definition, it is net debt plus equity.

15 Q Show me on this chart you have the numbers for net debt  
16 and for equity?

17 A So, the debt at this time was 61.4 in the senior  
18 secured notes, 4.5 percent convertible notes of 169.2, lease  
19 obligations of 1.1. Those are all positive numbers. So, if  
20 we now subtract the debt of the thirty-one the net debt would  
21 be the sum of those numbers.

22 Q That's what I'm confused about. How did the 31 million  
23 relate, or maybe I just don't get it. I'm asking you why you  
24 subtract that \$31 million dollar number from the debt amounts  
25 that appear above it?



1 A Because the actual definition of enterprise value you  
2 can look up at any text book, you could probably google this  
3 or Wikipedia it and it would say net debt plus equity equals  
4 enterprise valuation. So, it's because some companies may  
5 have more cash on hand and have more debt. It puts those  
6 together into a net debt position.

7 Q Okay. But the only way that makes sense to me is if  
8 you start from the 215.4 million which is multiplied or is a  
9 product of the multiplication below of the total enterprise  
10 value times 2.9 and then the total enterprise value of 2020  
11 estimated, right?

12 A That's an implied multiple. We didn't use a multiple  
13 here. This is the actual numbers as of 6/29/20 for the  
14 company. So, the actual market capitalization. These  
15 numbers on the trading value up at the top, the actual market  
16 capitalization was 14.7 million.

17 Q Yes.

18 A If you add all of those numbers below with that 14.7  
19 the sum is 215.4. We did not use a multiple. This is the  
20 implied multiple. So, if you took this and the 215.4 and  
21 divided it by 73.3 you get 2.9.

22 Q Where does the \$215.4 million dollar number come from?

23 A So, I will start at the top. The stock price as of  
24 6/29/20 was 82 cents. You times that by the 17.9 million  
25 shares you get 14.7 million is your market capitalization.

1 So, that is the value of your equity. Then you add the debt  
2 of 61.4 million, the debt is 169.2 million, the debt of 1.1  
3 million and then you subtract the cash on hand of 31. That  
4 sum is 215.4.

5 Q Okay. So, your testimony is that the company had \$31  
6 million dollars in cash on hand at that time?

7 A Yes.

8 MR. DEMMY: I have no other questions, Your Honor.

9 THE COURT: Okay. Thank you.

10 We're going to take another five minutes and then  
11 I am going to go to other objectors in the order in which I  
12 happen to have them which -- I'm looking at the shareholder  
13 objections at this point. So, we will start with, I'm not  
14 going to get your name correct again, you are going to have  
15 to say it for me. Mr. Manousiouthakis?

16 MR. MANOUSIOUTHAKIS: Manousiouthakis.

17 THE COURT: Say that again for me?

18 MR. MANOUSIOUTHAKIS: Manousiouthakis.

19 THE COURT: Manousiouthakis.

20 MR. MANOUSIOUTHAKIS: Perfect.

21 THE COURT: You will be first. Then I will go to  
22 Mr. Makosky, and then to Mr. Dijkstra. And I think those are  
23 all the shareholder objectors.

24 So, we're going to take five --

25 MR. MANOUSIOUTHAKIS: Your Honor?

1 THE COURT: Yes.

2 MR. MANOUSIOUTHAKIS: May I ask a question. The  
3 exhibit that I filed is up with the court?

4 THE COURT: Can you say that again?

5 MR. MANOUSIOUTHAKIS: An exhibit I filed  
6 yesterday, is that with the court? I mailed it to all of the  
7 lawyers.

8 THE COURT: I do believe I have an exhibit.

9 MR. MANOUSIOUTHAKIS: Just one page.

10 THE COURT: Yes. I do have that one page.

11 MR. MANOUSIOUTHAKIS: Okay. Thank you.

12 THE COURT: Okay. Thank you.

13 So, we will take five minutes and then we will  
14 start up again.

15 Again, Ms. Stratton, do not speak with anyone  
16 about your testimony. Thank you.

17 (Recess taken at 4:29 p.m.)

18 (Proceedings resumed at 4:41 p.m.)

19 THE COURT: Okay. Mr. Manousiouthakis, you can  
20 begin.

21 MR. MANOUSIOUTHAKIS: Thank you very much, Your  
22 Honor. I appreciate the opportunity.

23 CROSS EXAMINATION

24 BY MR. MANOUSIOUTHAKIS:

25 Q Ms. Stratton, I understand this must be a grueling

1 experience, but I appreciate your time.

2 Start with I'm going to ask you just general questions.

3 Is the valuation analysis (indiscernible) like mathematics?

4 (No verbal response)

5 Q Can you hear me?

6 THE COURT: Ms. Stratton, you're still muted.

7 THE WITNESS: Okay. I'm sorry. I couldn't  
8 understand his question.

9 BY MR. MANOUSIOUTHAKIS:

10 Q Okay. Is valuation analysis a good science like  
11 mathematics?

12 A There is some science and there is some art.

13 Q Thank you.

14 Now you joined Piper in 2010 and you have officially  
15 stated in your document that you're a managing director of  
16 Piper Sandler with substantial experience representing  
17 companies in connection with their restructuring efforts. Am  
18 I correct?

19 A Yes.

20 Q So, the word expert does not appear in that sentence.

21 Now as a Piper Sandler employee have you ever provided  
22 valuations for shareholders contesting corporate  
23 bankruptcies?

24 A I have not represented an equity committee.

25 Q Thank you.

1           So, Piper Sandler is the debtor's investment banker.  
2       Should the court consider the valuation you provided as an  
3       independent valuation or you showed the buyer of the possible  
4       relationship between the debtor and Piper?

5       A       We wouldn't put our professional reputation on the  
6       line. All of our work was done as objective as we could be.  
7       As you noted, there's some art or there's some subjectivity  
8       to the analysis, but we would not put our professional  
9       reputation on the line by doing something that didn't make  
10      sense to us.

11      Q       But if you were to try to publish this analysis in a  
12      scientific journal in the conflict of interest section you  
13      would have to report the fact that you are, you know,  
14      participating as an investment banker (indiscernible). That  
15      would be in your conflict of interest statement?

16      A       I'm not sure what you would need to do to publish a  
17      scientific paper. I have never done that. I'm sorry. I  
18      don't know what you need to do.

19      Q       Okay. Now as you stated in October 19th the debtors  
20      engaged you as their investment banker in connection with the  
21      valuation of the capital structure and potential strategic  
22      alternatives. You were essentially going to be tasked with  
23      finding a way to solve the issues. The main issues that they  
24      were dealing with was this debt that was in 2020. Everything  
25      else was going (indiscernible). Positive results, positive

1 submissions, increases in sales; everything is  
2 (indiscernible) except for the debt in 2020, correct?

3 A The company was -- I guess you could say that there was  
4 positive developments in the company's performance, yes.

5 Q Okay. So, I would like to know what strategic  
6 alternatives did you consider since October 2019? Did you  
7 consider asset sales? Did you consider asset licensing? A  
8 company's (indiscernible). The creation of a spin-off  
9 company. Issuance of (indiscernible) stock. Any other  
10 alternatives that you considered?

11 A There are quite a few items that we considered and what  
12 was landed on was a refinancing made the most sense. So, we  
13 undertook a refinancing effort.

14 Q Are you familiar with what the tracking stock is?

15 A I understand what a tracking stock is. We did --  
16 sometimes at Piper Jaffray; we had our equity capital markets  
17 team, our subordinated -- our convertible securities team,  
18 our pharmaceutical industry team and our restructuring and  
19 special situations team all at one point were involved in  
20 this client to look at all potential strategies.

21 Q So, therefore did you consider tracking stock and you  
22 decided against that because VIVUS has assets, several of  
23 them already marketed, several are in the pipeline, and no  
24 (indiscernible) investors that are typically the investors  
25 that are investing in the pharmaceutical business may look at

1 the company and say this drug is (indiscernible), this drug  
2 is okay, and this drug is the top of the line horse and I  
3 only want to invest on the top of the line horse. Did you  
4 consider this alternative?

5 I had, by the way, I don't know if you are familiar  
6 with it, made this accommodation to Mr. Oki and the board.  
7 Are you familiar with this and did you consider it as a  
8 serious possibility?

9 MR. BARR: Your Honor, its Matt Barr from Weil. I  
10 want to be very respectful of the pro se shareholders and let  
11 them ask all their questions, but if we could just ask him to  
12 break it down a little so there is no confusion for our  
13 witness and she can answer the questions. I think that would  
14 be very helpful.

15 THE COURT: He can do that.

16 Ms. Stratton, I also want you to answer his  
17 question. The first question he asked was what other courses  
18 of conduct did you consider and you didn't answer that  
19 question.

20 THE WITNESS: Okay.

21 THE COURT: You said we considered a lot, but this  
22 is what we landed on. His question was what alternatives  
23 were considered.

24 THE WITNESS: It is my understanding, I am not an  
25 equity capital markets expert, that is why we brought them

1 in. We looked at financing either with debt, convertible  
2 securities, we looked at equity offerings. I do believe at  
3 one point we did discuss the potential sale of assets.  
4 Within the equity capital markets on what types of things we  
5 could do with equity I can't tell you what things that were  
6 considered. I can tell you that our team did look at is  
7 there any other possible way to unlock value or provide  
8 capital to pay off the IEH debt.

9 So, I couldn't answer if they looked at the  
10 tracking stock specifically.

11 BY MR. MANOUSIOUTHAKIS:

12 Q Okay. Thank you.

13 Now, VIVUS should have done an acquisition of Pancreaze  
14 on June 11, 2018, for \$135 million and most recently, it was  
15 reported that it was generating a quarterly net product  
16 revenue of \$5.783 million a quarter. The numbers are 135  
17 million out of the company, 5.783 in the company every  
18 quarter.

19 Just a simple multiplication tells me that it would  
20 take me six years just to get back my money. Who does that  
21 when they sell a debt due in less than two years.

22 A So, Doctor, I wasn't involved with the company in 2018  
23 when they made that decision.

24 Q I appreciate that.

25 A My understanding is that they had a very large G&A



1 structure and the strategy was to bring more revenue to cover  
2 that G&A and potentially turn Pancreaze around to grow factor  
3 and that that would provide the means to paying off the debt.

4 Q But at that point in time, Piper was hired, was already  
5 the investment banker of VIVUS.

6 Would you have recommended against the Pancreaze  
7 purchase?

8 A I don't have enough facts to tell you whether if I  
9 would or not. I'm sorry, I just --

10 Q But preferring to pay --

11 A -- I can't Monday-morning quarterback.

12 Q -- that capital recovery in six years is an  
13 unacceptable metric in this business.

14 A I do know that it hasn't performed the way that they  
15 would like it to perform, but I can't second-guess their  
16 decisions at the time.

17 Q Okay. Now, in January of 2020, VIVUS made an  
18 investment presentation titled, "Innovate, Deliver, and Go."  
19 And in this investment presentation, at that time, Piper was  
20 their investment banker.

21 A Yes.

22 Q In that presentation, they referred to the first five  
23 quarters of their turnaround plan having been completed, then  
24 they stated that they would address the (indiscernible) debt  
25 and made additional statements about VI-0106. I will read

1 those later.

2 But since you were the investment banker, I presume  
3 they're talking to you and you are familiar with what they  
4 are presenting out in the investor world, did this plan, so-  
5 called 10-quarter plan make any sense when in the middle of  
6 it, there's an enormous debt payment due? Who plans on a 10-  
7 quarter set of actions and does not share a clear idea of how  
8 in the middle of that 10 quarters, there's going to be an  
9 enormous debt coming due, who does that?

10 A So, I think there's two questions there. So, one,  
11 while we were the company's investment banker, we weren't  
12 engaged to assist them with their corporate presentations, so  
13 we were not involved in their corporate presentations.

14 And, two, I know that their plan was slower -- their  
15 turnaround plan happened slower than they had anticipated, so  
16 I would guess when they made those thought plans, they did  
17 hope and thought that they might achieve the ability to pay  
18 off the debt and they were not able to.

19 Q Did you know that in that same presentation they stated  
20 that they were planning to file an IND for a Phase II(a)  
21 study for VI-0116 [sic] in the first half of 2020?

22 A I had not -- until I read that, no, I was not aware  
23 that they were ready to file that that IND and I don't think  
24 they were at a point where they were ready.

25 Q Okay. If they had done this IND, as they stated in

1 that presentation -- this is not on old presentation, we're  
2 talking about January of 2020 -- so, in this presentation  
3 they made that statement. If they had done that submission,  
4 would you have valued VI-0106 much higher than zero?

5 A I think that that is an if, so my understanding from  
6 the company is they didn't meet their goals on the  
7 formulations to be ready to file an IND and I think they  
8 anticipated that our refinance efforts would work and that  
9 they would have the ability to fund the Phase II(a) study.

10 Q I understand that. It's a hypothetical.  
11 I'm asking if they had done it, would the value of VI-0106  
12 would have been estimated to be higher by you?

13 A I couldn't tell you. I guess it would depend if they  
14 had end results from the Phase II as to the efficacy by that  
15 point.

16 Q Well, if they submit an IND, that is inherent in that  
17 statement.

18 A My understanding is you can submit it to start a Phase  
19 II, but that doesn't mean that you won't have a failed Phase  
20 II study.

21 Q Well, then the concept (indiscernible), it fails. They  
22 had successful results from Phase I, but with  
23 (indiscernible), which included patient treatment known as --

24 THE COURT: Excuse me. People, please mute your  
25 phones.

1 MR. MANOUSIOUTHAKIS: Okay. Am I -- okay. Thank  
2 you, Your Honor.

3 BY MR. MANOUSIOUTHAKIS:

4 Q Okay. Let's move on.

5 So, now, as I understand it, the stock offering you  
6 were not involved with later, was done later in the year and  
7 Wainsworth (ph) was hired.

8 Piper doesn't have expertise about stock offerings? I  
9 mean, what's the reason that there was a (indiscernible)  
10 there?

11 A So, my understanding -- again, I mean not an expert in  
12 equity capital markets -- is that on the smaller offerings  
13 there, are other investment banks that are better at those  
14 than Piper is.

15 Q Did you know if the stock offering was opened up to  
16 repaying investors, like many companies, especially in the  
17 pharma business, they go, approach the existing shareholders,  
18 they tell them, thank you for supporting us, if you want to  
19 increase your participation, would you consider be warrants,  
20 would you consider increasing your investments and so on.

21 Was any of that done, do you know?

22 A I do not know the details of the RDL on April 1st.

23 Q Okay. Now, in your DCF analysis there are some  
24 possibilities of dramatic expansion of various markets. We  
25 know for a fact that with the Belviq competitor to Qsymia,

1 having been pulled out of the market, there's an opportunity  
2 to grab market share that Belviq used to occupy.

3 And there are statements by the drug analysts that the  
4 management was being approached by people, you know, entities  
5 that would prefer using Belviq to increase their  
6 participation.

7 So, have you accounted for the increased Belviq share  
8 into your projections for future cash flow?

9 A But my understanding is they competed with Belviq in  
10 the U.S. market and that they have, in fact, gained some  
11 market share in the U.S. market that was part of Belviq's,  
12 and that is included in the projections and included in their  
13 performance.

14 Q So, the projections that you have shown already  
15 anticipate how much of the Belviq market they're grabbing?

16 A That is correct.

17 Q What is the number?

18 A I don't have that specific number, I just know in our  
19 discussions with the company's management that the  
20 projections were formed and as we made changes to them along  
21 the way, there was a discussion, in fact, specifically about  
22 Belviq and my understanding is that the are scripts that they  
23 projected that are in the projections are based on the ones  
24 they thought they could obtain from Belviq.

25 Q I believe it is very important for the Court and all of

1 us to know what is that projection or how much of the Belviq  
2 market has been estimated to be taken over by VIVUS.

3 Okay. I will move on.

4 Now, you're familiar with the Obesity Act in Congress,  
5 correct?

6 A Yes.

7 Q Now, if one reads, just the text of the Obesity Act, it  
8 will have that the market expansion, if it is approved and  
9 becomes law. So, what is the market for other anti-obesity  
10 drugs?

11 I have given an estimate in my letters to the Court of the  
12 factor of seven increase in the total market for anti-obesity  
13 drugs if the Obesity Act is approved in Congress.

14 Also, it is known now that obesity is an extremely  
15 serious adverse factor for impacts -- on health impacts of  
16 COVID-19; these people die much more frequently from, you  
17 know, COVID-19. I do not understand why that has not been  
18 discussed in the society at large, since we're talking about  
19 deaths of many, many, many people.

20 But be that as it may, if the Obesity Act was approved  
21 tomorrow, can you tell me how would your cash flow estimates  
22 change?

23 A So, if I just recall -- and I don't have that letter;  
24 that was from the equity committee hearing, that letter and  
25 your objection -- I do recall that, you know, you have said

1 that seven-times factor was based on your estimate of the  
2 price per person and using a 2030 estimate of the number of  
3 obese people on Medicare.

4 Q Yes, I did --

5 A So, I'm not sure that would be the appropriate  
6 addressable market. I'm not sure I agree with your seven  
7 times, however, the company does have a BMI-managed care  
8 program in their projections and they believe they're making  
9 good strides in that BMI-managed care program because of  
10 obesity and because of COVID-19.

11 So, John Amos, the CEO of the company, talks about the  
12 comorbidity of obesity and COVID-19 all the time and it's  
13 factored into the projections. I do not believe that they  
14 added a lot on the Obesity Act because it's an if, it hasn't  
15 been approved. They won't know to what extent that could  
16 change the market for them. It's something that could be a  
17 positive development or a revenue opportunity, but right now  
18 there's not enough information.

19 Q Okay. All of the numbers about the potential increase  
20 inside the text of the law itself, it contains the statement  
21 that there's an extra \$2,000 that has been spent on obese  
22 Medicare recipients versus non-obese Medicare recipients and  
23 said that there are tens of millions of Medicare recipients  
24 that would be classified as obese and so on.

25 If you want to challenge the factor of seven that I

1 have used, I'm perfectly happy for you to do that, but it is  
2 a massive jump to what may happen until the obesity space in  
3 short order because of the emergency we all live in.

4 So, I would urge the Court to, you know, take a closer  
5 look at this. This is life-and-death stuff.

6 A So, is there a question for me or ...

7 Q No.

8 A Okay.

9 Q You answered to the extent.

10 A Okay.

11 Q Now, I wanted to go a little bit in your table that you  
12 have in your report at page 44 with the comparables. And I  
13 have given kind of an Excel version of this. I just used  
14 your numbers in what I gave to the Board.

15 Now, the enterprise value that you have in your first  
16 column, how can one very quickly calculate the fourth column?  
17 Is there a sophisticated set of calculations involved or just  
18 simple two plus two equals four?

19 A I just need to get my thing in front of me.

20 Q It's on page 44 of Document 191.

21 A So, it should be market cap --

22 Q Yeah.

23 A -- plus debt --

24 Q Yes.

25 A -- minus cash.



1 Q Okay. So, this is very close to Dr. Amati's (phonetic)  
2 definition of two plus two equals four. You know, I mean, I  
3 don't want to -- you know, (indiscernible) mine  
4 (indiscernible). That's fine.

5 Now, there is an issue there that one of the numbers  
6 that seems to not abide by the formula as you reproduce all  
7 of these numbers and, indeed, they are exactly what you just  
8 said, except for the one at Knight Therapeutics. That seems  
9 to have some discrepancy. I don't know if it's just a typo  
10 or, you know, what it is, but it should be as it may.

11 What I decided to do afterwards is the cash and the  
12 debt things are kind of just facts, like, they are what they  
13 are. No one can change them, you know, at the time of the  
14 report.

15 But the market capitalization is a very different  
16 animal. So, in the document I provided to the Court, I made  
17 a simple correlation between the enterprise value and the  
18 market capitalization, although, we know that the enterprise  
19 value, the fourth column is the first column plus the third  
20 column, minus the second column. That's simple math.

21 On top of that there's a very interesting, I would say  
22 linear correlation between the enterprise value and the  
23 market cap.

24 Do you see that block? Do you have access to that  
25 block?

1 A Yes.

2 Q So, would you agree that this is a pretty strong, you  
3 know, linear correlation?

4 A You would expect that because the market capitalization  
5 is part of the enterprise value.

6 Q Okay. So, yes, but it's actually what -- the point I'm  
7 making is that it's the driving force behind the enterprise  
8 value, okay. If it is a single correlation, 1:1 and there is  
9 some (indiscernible) that's pretty strong, it's a very strong  
10 indicator.

11 Unfortunately for all of us, there's something called  
12 stock shorting in the world. Are you familiar with stock  
13 shorting?

14 A Yes.

15 Q So, can you give us your own definition and, you know,  
16 kind of insight into what stock shorting is.

17 A There are investors who think the stock will decline in  
18 value, so they sell it short.

19 Q Okay. Could there be investors out there that want to  
20 make this happen?

21 A I suppose, yes. I'm not sure I understand that  
22 question, but --

23 Q I mean, we don't know -- we cannot attribute intent to  
24 people we don't know.

25 A No.

1 Q So, it's a possibility.

2 Now, the question is, can you also give us some insight  
3 -- by the way, just to clarify, again, what is stock  
4 shorting, stock shorting means you don't own the shares of  
5 the stock because you believe that it will appreciate in  
6 value; you go borrow shares of the stock and sell them at the  
7 high price, hoping that it will drop and you will be able to  
8 cover the shares at the lower price.

9 Is that a fair description of what stock shorting is?

10 A Yes.

11 Q Are okay. So, now, are you familiar with something  
12 called naked stock shorting?

13 A I'm sorry, with what?

14 Q Naked stock shorting.

15 A I've heard the term before.

16 Q Okay. So, basically, there, you know, if I own an  
17 account in a brokerage house, if someone wants to borrow my  
18 shares, then sometimes they come and ask me, do you want to  
19 lend your shares and, here, we're going to give you some  
20 interest for that and so on.

21 But, then, it seems that there is some practice that I,  
22 you know, that is, you know, (indiscernible) out there who  
23 advise this kind of interactions with the owners of the  
24 shares is not quite happening.

25 Okay. So, the important thing that we establish that

1 you agree with is that stock shorting does share some  
2 influence on market capitalization. If some stock is highly  
3 shorted, then it's inevitably going to lose market  
4 capitalization.

5 A I don't think I said that. I think -- I don't think I  
6 said that. I think I said that if you're -- if you want to  
7 short the stock, it means you believe the value will go down.

8 Q Okay. So, you don't agree it's a causal event, but the  
9 correlation of the two, that you agree with?

10 A I can't tell you that. I don't -- I'm not an expert in  
11 public equities.

12 Q Okay. All right. That's fine.

13 So, you know, this is fine. Now, getting the  
14 comparables that you have used, you have employed the  
15 comparables to be companies that are trading between one  
16 fifty million and a billion.

17 What made you pick this range?

18 A It seemed like the appropriate size for a comparable  
19 company to VIVUS.

20 Q Okay. And how did you decide that? You looked at the  
21 market capital of VIVUS at some time and said, okay, I'm  
22 going to go a little below and a little above?

23 A It's actually a lot more detailed. We had several  
24 discussions on my team about what the appropriate range would  
25 be.

1 I relied heavily on my specialty pharmaceutical partner  
2 on which companies and size he thought was most relevant to  
3 VIVUS and most comparable.

4 Q Okay.

5 A Again, you have to find comparable companies.

6 Q Okay. One company that is interestingly excluded from  
7 your list in page 44 is Arena Pharmaceuticals, which is, in  
8 fact, one of the companies that is driving PAH business.  
9 Interestingly enough Arena Pharmaceuticals was also a company  
10 that was involved in Belviq that we were talking about before  
11 and somehow over time it licensed the rights of Belviq away  
12 and so on. It would seem to me that if I am going to create  
13 a list of comparables to VIVUS, Arena would be found in that  
14 list, as a primary, you know, competitor.

15 Now, you did an upper limit in your choice of companies  
16 that this will compare to. Yes, Arena would not show up  
17 because Arena shows a valuation of \$3.9 billion. It's a  
18 much-higher evaluated company.

19 Of course, that doesn't contradict with my estimate  
20 that I gave before to the Court of \$8 billion, but it does  
21 contradict with the 1.5 upper -- one-billion upper limit that  
22 you shared in your list of comparables.

23 Do you share any comment of that?

24 A So, again, we were trying to look for companies that  
25 are the most comparable and in our opinion, those larger

1 companies have more commercial -- could potentially have more  
2 drugs that are developed and commercial. They have different  
3 capital structures.

4 We believe having the right range of size makes it the  
5 most comparable.

6 Q Well --

7 A So, there may be some companies that are in the same  
8 treatment lines that have other treatments or larger  
9 companies and we did not want to have to factor in, into our  
10 comparable company analysis, the size discount.

11 Q Well, okay. Let me give you some facts about Arena,  
12 then maybe you will, you know, change your opinion and  
13 include it in your list.

14 Arena Pharmaceuticals, according to the 10-Q form  
15 from June 3rd, 2020, they have zero drugs on the market.  
16 VIVUS has at least two and we can talk about the rest. It  
17 has three drugs that are in clinical development. One is the  
18 PAH drugs that they've, you know, discussed. Also, and these  
19 are four licensed programs, a billion for joint and clinical  
20 development.

21 So, I will repeat the numbers again. Zero drugs  
22 marketed, three drugs in active clinical development --  
23 they're doing that on their own and four license agreements.  
24 PAH are in phase zero.

25 So, why isn't Arena an exact comparable VIVUS? We

1 (indiscernible).

2 A VIVUS actually has three commercial drugs. They have a  
3 sales organization.

4 So, I'm not familiar with Arena, but it falls outside  
5 the criteria that we chose to be comparable to the company.

6 Q And that is what I am saying, that maybe you should  
7 change your criteria because you are excluding, effectively,  
8 what used to be the main competitor of VIVUS. Arena -- I am  
9 a (indiscernible) investor in VIVUS -- when you talk to VIVUS  
10 investors 10 years ago, the only discussion was, what is  
11 VIVUS doing? What is Arena doing? What is VIVUS doing?  
12 What is Arena doing? And that has been going on for a long  
13 time.

14 Now, let me make some other points about your list.  
15 You have included in your list a company could Acorda  
16 Therapeutics. This is the lowest-capitalized company.

17 Now, when they're starting to take the medians and  
18 things like that of the valuation and so on, it's companies  
19 that have low valuation that are included the list, then the  
20 median drops, right; is that correct?

21 A Again, our range was from one fifty to one billion, so,  
22 I think we thought we were selecting a pretty large range.

23 And while their market cap is low, because they have  
24 debt and a high debt number, their enterprise number meets  
25 our criteria.

1 Q Okay. That is not --

2 A We didn't look at just market capitalization.

3 Q I understand, but that is not the only reason.

4 When one examines the 10-Q form of Acorda Therapeutics  
5 June 30, it has only two drugs marketed. They are for  
6 Parkinson's and multiple sclerosis. These are much smaller  
7 markets than the massive markets that VIVUS addresses, which  
8 are for obesity, for, you know, pancreatic problems, and for  
9 impotence.

10 On top of that, one of the drugs has a 40-percent  
11 decline in sale, unlike VIVUS, which having growth in its  
12 sales because it has lost legal patent protection fights.

13 So, Acorda Therapeutics should not be on that list.  
14 It's a completely illegitimate comparison to VIVUS.  
15 Second, Adamas Pharmaceuticals --

16 MR. FRIEDMANN: Your Honor, this is Jared  
17 Friedmann --

18 THE COURT: Let's -- excuse me -- let's let --  
19 have Ms. Stratton respond to why she thinks that that one is  
20 appropriately on the list and then you can go on to another  
21 one.

22 MR. FRIEDMANN: Thank you, Your Honor.

23 MR. MANOUSIOUTHAKIS: Yes. Thank you very much,  
24 Your Honor. I apologize, I'm not a lawyer, okay. So, please  
25 correct me every time you guys, when you think I'm, you know,



1 not asking the right things or saying the right things and so  
2 on.

3 THE WITNESS: Okay. Again, in this analysis, we  
4 didn't handpick companies. We came up with a criteria and  
5 our criteria was 150 million to roughly 1 billion in  
6 enterprise value. So, and, again, if we went back to our  
7 criteria, which was on page 4, it was also they marketed one  
8 or more brand of specialty pharmaceutical products, they are  
9 a North American-branded specialty pharmaceutical company,  
10 and that they had planned targets for 2020 revenue.

11 All of these companies fit that criteria. We didn't  
12 handpick any. We didn't throw any out.

13 BY MR. MANOUSIOUTHAKIS:

14 Q I am not suggesting that you handpicked --

15 A We didn't add any.

16 Q I am not suggesting that you handpicked out anything.  
17 I am not suggesting any intent or anything like that.

18 But what I am suggesting is that it is simply not  
19 appropriate to include this company in the comparison list.

20 Okay. Let move --

21 MR. FRIEDMANN: Your Honor, this is Jared  
22 Friedmann, again, if I may interrupt.

23 You know, we're trying to be very respectful of  
24 the stockholder who's asking questions. We would just ask  
25 that they also allow Ms. Stratton to be able to answer the

1 questions. Every time she tries to answer, she's getting cut  
2 off by the next question.

3 So, I understand it's difficult on Zoom.  
4 Unfortunately, we're not able to be in the courtroom, but it  
5 is important for Ms. Stratton to be able to get the answers  
6 out, as well. Thank you.

7 THE COURT: Thank you. Let me ask a question that  
8 I think is related to what Mr. Manousiouthakis is asking,  
9 which is going back to the company before that was a direct  
10 competitor, albeit, I think, at a higher enterprise value,  
11 why isn't that an appropriate company to be on the list, a  
12 direct competitor of VIVUS, regardless of the enterprise  
13 value?

14 THE WITNESS: They have no commercial products  
15 that they currently sell and have the salesforce. The three  
16 commercial products that the company has, they have an  
17 internal salesforce to sell them; Arena does not. They also  
18 have drugs under development.

19 And I think that people are mistaking, they're  
20 trying to bring in transactions where there's a PAH program.  
21 We are not valuing PAH. It would be inappropriate to take a  
22 PAH program comparable, unless it's in this list of companies  
23 that have a commercial drug in this range. I think that the  
24 argument that people are trying to make is they're trying to  
25 tell me the methodology if we had value to VI-0106, and I

1 maintain I am not valuing VI-0106, so that company is not  
2 comparable to the company.

3 THE COURT: Okay. So, fair enough.

4 I do have questions around --

5 THE WITNESS: Okay.

6 THE COURT: -- but I'm going to let everyone else  
7 ask their questions first.

8 But what I understand you to be saying, and this  
9 may answer, perhaps, some of the other questions, is that you  
10 are not looking -- because you do not place any value,  
11 because you place a zero value on VI-0 --

12 THE WITNESS: 0106.

13 THE COURT: -- VI-0106 -- thank you -- I thought I  
14 had that down before today, but I don't -- 0106, because you  
15 place no value on VI-0106, both, your public comparables in  
16 terms of -- your public comparables, in terms of your  
17 precedent acquisitions and your precedent asset purchases is  
18 not looking for comparables for VI-0106.

19 Is that right?

20 THE WITNESS: That's correct.

21 It could be if it was a commercial drug for PAH,  
22 which there are drugs that are commercial for PAH treatments,  
23 if they landed in this public comparable set, they would be  
24 here. If they had sold as a commercial drug, they would be  
25 in our precedent transactions or precedent assets.

1 I can't tell you right now if any of those have a  
2 PAH commercial drug, but these are for companies that have  
3 commercial, branded, specialty pharmaceutical products.

4 THE COURT: Okay. And what's the virtue of not  
5 handpicking the company, which you've stressed several times.

6 THE WITNESS: Because I think if we handpick, then  
7 people would say, Well, you handpicked to try to get to a  
8 valuation.

9 What we thought was more important was finding a  
10 comparable dataset and coming up with the right metrics to  
11 meet, and once they meet those metrics, we use all of them.  
12 So, we don't say, Gee, this company is too high, let's take  
13 it out. We made our criteria. Anything that met our  
14 criteria was included in our analysis.

15 THE COURT: Okay. Thank you I didn't mean to  
16 hijack you, Mr. Manousiouthakis, I just wanted to see if,  
17 hopefully, my questions were also along the lines of your  
18 questions, but please start -- please begin again.

19 MR. MANOUSIOUTHAKIS: Your Honor, I appreciate  
20 your interventions at any and all times. So, I will  
21 continue.

22 BY MR. MANOUSIOUTHAKIS:

23 Q The second-lowest market capitalization in your list is  
24 Adamas Pharmaceuticals and I will tell you, again, what they  
25 are involved with. They are marketing only one drug. It's

1 for a much-smaller market, Parkinson's and multiple sclerosis  
2 again. And they have another drug partnered, Alzheimer's.  
3 This is a class lower than VIVUS in terms of assets. It  
4 shouldn't be on the list. Would you agree with that, given  
5 the information I'm giving you, one drug marketed, one drug  
6 partnered.

7 A So, as I said, our criteria was for North American,  
8 commercial-branded, specialty pharmaceutical companies.  
9 There are several different brands for different therapies  
10 that VIVUS has, and so you have to have a broad enough  
11 sector.

12 So, we didn't go through and say, Who markets an  
13 obesity drug, which, by the way, is a very difficult market.  
14 Who does pancreatic market?

15 We went through and said, Okay, what is a set of public  
16 companies that has branded specialty products?

17 And, again, you can't find direct comparables always.  
18 This is the valuation methodology as you come up with your  
19 dataset.

20 And for our dataset we determined it made sense to  
21 start with companies with \$150 million up to 1 billion. And  
22 remember, at the time, if you were to look at the company's  
23 market cap and its implied market enterprise value, it's on  
24 the lower end, and we went all the way up to a billion.

25 So, we didn't say, Let's stop it at 300, let's stop it

1 at 500; we went all the way to a billion to give it the  
2 benefit of its potential growth.

3 Q I appreciate that.

4 I will go now -- you used the expression, we went up to  
5 a billion. I would personally have used an expression, my  
6 lower bound was a billion. Let me explain why.

7 (Indiscernible) Pharmaceuticals is the highest capitalized  
8 company in your list. It is marketing two drugs, just as  
9 VIVUS, in fact, it has a common component in one of its drugs  
10 with Qsymia; it's topiramate. And on a much smaller market,  
11 it's migraine headache prophylaxis and epilepsy, a much  
12 smaller market. The second one is, again, the same small  
13 market, epilepsy, until the second drug called  
14 (indiscernible).

15 These drugs are not of the scope of the VIVUS drugs in  
16 terms of market size. They also have three drugs in clinical  
17 development, one of which is admittedly ready to be submitted  
18 to the FDA and that they do by November 2020. There are two  
19 other Phase I drugs.

20 So, what's (indiscernible) of VIVUS, if you would agree  
21 with me, I'm asking, is it should be real and (indiscernible)  
22 two marketed and three in active development, two of which  
23 are Phase I.

24 A So, I -- I'm sorry, Doctor, I'm not really sure how to  
25 answer your question.

1           Again, we used a criteria. I will point out it's not -  
2 - it doesn't matter for this analysis, but I do remember that  
3 even with Qsymia, they do face generic competition in 2024,  
4 you know, so, if you are telling me that there are companies  
5 that may not have the same addressable market, we may have  
6 the same issue with this company in the future.

7       Q       Well, I appreciate that and I will point out to you  
8 that the company has been very active in submitting patent  
9 applications so that the scope and applicability of Qsymia is  
10 extended. It's a classical strategy by companies to extend  
11 the applicability of the patent protection.

12       A       Yes, and that's why in our terminal value and our  
13 discounted cash flow, we did believe that the management will  
14 be successful in fighting off some of those generic  
15 competitors.

16       Q       Okay. So, I hope we will agree that the company at the  
17 top of your one-billion list, Supernus is at one-billion  
18 capitalization has two drugs marketed less than VIVUS and  
19 three drugs in active clinical development, only one of which  
20 is in Phase 3. It has no licensing arrangements like VIVUS  
21 does.

22           Do you agree with these facts?

23       A       I'm sorry, I just -- I can't tell you which companies  
24 are directly comparable or not. I think we are trying to get  
25 a broad range --

1 Q I'm reading facts of the 10-Q form of Supernus, I  
2 apologize.

3 A I mean, Supernus also has 402 million of LTM revenue  
4 and growing if you look at their revenue projections for 2020  
5 and 2021.

6 Q Okay. So, we'll leave it at that.

7 Now, two other companies that I want to discuss on your  
8 list, let me find their names -- HLS Therapeutics and Knight  
9 Therapeutics. Now, when the stock of VIVUS was trading, do  
10 you know in which markets it was trading?

11 A I don't recall right now, I'm sorry.

12 Q Okay. It was NASDAQ. It was trading in --

13 A I do know that. I do know that. I do know that.

14 Q Okay. So, NASDAQ is a very healthy marketplace. It  
15 provides liquidity to companies and so on and so forth.

16 Now, in your list, the two companies, (indiscernible)  
17 Therapeutics and Knight Therapeutics, are both Canadian  
18 companies and they both trade over the counter. When one  
19 looks at the typical information to investigate whether to  
20 invest in a company and so on, you look at the information  
21 that the brokerage houses provide.

22 There's no information in very large brokerage houses.  
23 So, these are Canadian companies trading in the over-the-  
24 counter market, which has extremely small liquidity; in fact,  
25 I was checking the trading volume yesterday. It was nothing.



1 There is no trading volume.

2       These companies shouldn't be in the comparison list.  
3 VIVUS was trading, you know, millions of shares. They did  
4 nothing --

5 A       I think HLS actually really helps you with an 8.4 times  
6 enterprise value to 2020 revenue and, again --

7 Q       I always look at the (indiscernible). I don't do  
8 reverse engineering in my business. I don't care if it helps  
9 me or hurts me. It shouldn't be there.

10       Now, that is, you know, my comment about that, that the  
11 liquidity of these companies and the information so that  
12 people can invest in them is nothing, so, therefore, I don't  
13 know why they're on your list.

14       The other thing I'm trying to understand better, your  
15 statement about the corporation between the Mankind and  
16 United but gave so much money to Mankind only after a Phase I  
17 trial. And you made a statement earlier that it would help  
18 tremendously, me and I believe the Court.

19       What is your statement, that this is not a comparable  
20 because what?

21 A       So, Treprostinil is the drug that Mankind was using  
22 this method of delivery for. Treprostinil has already been  
23 approved for the treatment of PAH and United Therapeutics is  
24 using that. Uniting Therapeutics bought this asset, one, to  
25 take on a direct competitor for the same drug with a

1 different delivery of -- a different method of delivery, and  
2 also so they can obtain that method of delivery not only for  
3 their PAH program, but for other drugs that they already have  
4 commercialized or are in development.

5 So, they bought the -- they paid off a competitor and  
6 they bought a method of delivery that they thought would  
7 improve their own product.

8 Q Okay. I am sorry, but there a several issues in your  
9 statement, so let me clarify.

10 So, this, United has this Treprostinil, a compound, and  
11 essentially what it got from Mankind is the right to deliver  
12 it in an aerosol form.

13 Well, okay. So, (indiscernible) is a well-known  
14 chemical entity. It's, you know, it's commonly used by many,  
15 many people for many, many things. VIVUS has acquired the  
16 rights to its use for PAH.

17 There's no difference between these two things. They  
18 could easily make a deal United Therapeutics and say, Hey, do  
19 you want to use tacrolimus for PAH, you talk to us, and you  
20 give us \$90 million.

21 So, you understand my point? What is the difference?

22 A But tacrolimus has not been approved for the treatment  
23 of PAH.

24 Q None of them are --

25 A Treprostinil hasn't been approved for the treatment

1 of --

2 Q -- Mankind's has not been approved. It has just  
3 announced Phase I results. VIVUS has announced Phase I  
4 results. These are the same --

5 MR. FRIEDMANN: Your Honor, this is Jared  
6 Friedmann again. The witness continued to be interrupted.  
7 She's being asked questions, sometimes several at a time.  
8 She's trying -- she's being very patient -- she's trying to  
9 answer all of them.

10 This has been going on for an hour and a half now,  
11 but she needs to be given an opportunity to answer the  
12 questions and they actually obviate the next question that's  
13 coming if she can answer the first one that was given.

14 MR. MANOUSIOUTHAKIS: I apologize.

15 THE COURT: Okay. Ms. Stratton, do you want to  
16 tell us what the difference is when they both have only been  
17 in the Phase I approval?

18 THE WITNESS: So, Treprostinil, which is the drug  
19 that's being used by Mankind with a new method of delivery,  
20 which is an aerosol, has been approved for the treatment of  
21 PAH.

22 VI-0106, while it's been approved to approve other  
23 therapies for other diseases, has never been approved for the  
24 treatment of PAH. There is no efficacy data that VI-0106 --  
25 I shouldn't say that -- they have three compassionate-use

1 patients. They have not completed any Phase II efficacy data  
2 to prove that it will be -- to prove that it will work or --  
3 and it has never been approved for the treatment of PAH.

4 So, there's many more hurdles for VI-0106 to meet  
5 before it can be viable or it meets the inflection point of  
6 valuation. It is not the same.

7 BY MR. MANOUSIOUTHAKIS:

8 Q Okay. Well, I will leave that statement to this point.  
9 I mean, again, the point is that they both have completed  
10 successful, you know, Phase I trials where there has been  
11 efficacy demonstrated in a number of patients. These are not  
12 just safety, you know, assessment trials.

13 Now, the other issue that is related to that is this  
14 issue about whether or not there was something additional in  
15 this license that would involve other drugs in the delivery  
16 of other drugs through this aerosol-delivery method.

17 The announcement is very clear. It says that Mankind  
18 will be entitled to receive low double-digit royalties for  
19 the up-front payment of 45 million and potential milestone  
20 payments of up to 50 million and this deal will be for  
21 development and commercialization of a dry powder formulation  
22 of Treprostinil, just one drug.

23 Afterwards, it states that Mankind granted United  
24 Therapeutics an option to expand the license to include other  
25 active agreements for the treatment of pulmonary

1 hypertension. Each optioned product would be subject to the  
2 payment to Mankind of up to 40 million in additional option  
3 exercise and development milestone payments, as well as a  
4 low-double-digit royalty on net sales of any such product.  
5 There's more money coming to Mankind if other products come  
6 into play.

7 I hope you would correct your earlier statement to that  
8 effect.

9 A Yes, I understand. They paid for the options. They  
10 did pay up front. Some of that would go towards the options.

11 Q But the option would deliver additional money to  
12 Mankind as other drugs --

13 A I understand that.

14 Q Yes?

15 A I understand that.

16 Q Okay. I appreciate it.

17 I want to thank you very much for your forthcoming and,  
18 you know, clear nature of your statements and I apologize if  
19 I was -- seemed to be, you know, intrusive into your answers.

20 Thank you very much.

21 MR. MANOUSIOUTHAKIS: And thank you, Your Honor,  
22 for giving me the opportunity to speak.

23 THE COURT: Thank you.

24 Ms. Stratton, how you doing? Do you need a break?

25 THE WITNESS: I'm good.

1 THE COURT: Okay.

2 THE WITNESS: I'm good if you want to keep going.

3 THE COURT: Okay. Let's go on to your next  
4 shareholder and I think it was Mr. Makosky.

5 MR. MAKOSKY: Yes, Your Honor.

6 Hello, this is Bruce Makosky. Thanks for giving  
7 me the opportunity to ask Ms. Stratton some questions.

8 CROSS-EXAMINATION

9 BY MR. MAKOSKY:

10 Q The first point I wanted to make -- I don't think  
11 anybody brought this up yet -- but with regards to the VI-  
12 0106, it's actually been shown in, I think it was in the  
13 Phase I(b) studies that they used it in 22 patients in a  
14 compassionate study that it actually had the effect of  
15 reversing the PAH disease process and I think that's  
16 significant because I believe there are other competitors in  
17 the market, but my understanding is that those other  
18 competitors are really just treating the symptoms, so they're  
19 palliative, whereas, the VI-0106, tacrolimus compound  
20 certainly has the potential and it's been proven to actually  
21 reverse the disease.

22 And so, I find it very puzzling why Ms. Stratton  
23 wouldn't have any valuation for VI-0106 in her analysis.

24 Ms. Stratton, are you aware of that fact, that in the  
25 compassionate studies that VI-0106 has been shown to actually

1 reverse the process of the disease state of PAH in the  
2 patients that they study?

3 A So, my understanding is there were three compassionate-  
4 use patients and that was done at Stanford and that the Phase  
5 I study was for the safety of the formulation. So, I don't  
6 believe there's any new efficacy data since they purchased  
7 the assets, but there's -- that data is from three  
8 compassionate-use patients.

9 We don't believe that's a strong sample to have proven  
10 that it has -- that it can reverse -- it sounds like there is  
11 great promise that it can, but they haven't gotten to the  
12 efficacy studies in Phase II to prove that it does.

13 Q Okay. Are you aware, also, that part of the -- or the  
14 delay for VIVUS filing the IND to actually move it forward in  
15 the clinicals was due to some stability testing, that they've  
16 actually been claiming for, I believe it's 12 or 18 months --  
17 it's a very long period of time -- are you aware of that  
18 issue, as well?

19 A I do understand that issue.

20 Q Okay. And that suddenly now that they're just going  
21 bankrupt, they suddenly have solved the stability issues and  
22 they're able to move forward and file the IND because the  
23 last speaker said in the second half of this year. So, it  
24 seems like kind of a coincidence that they had been stuck on  
25 this one issue for so long, just long enough for them

1 suddenly now they don't have the funding to move forward.

2       Okay. So, that's -- I did want to mention that about  
3 VI-0106, and then the other thing I'd like to ask you about  
4 is this recently came to my attention that there's a number  
5 of patents that VIVUS has that they recently, I believe,  
6 registered as utility patents and they were filed on Docket  
7 24 as Exhibit F.

8       I don't know if it's possible to bring that up; if it's  
9 not, I can just -- I just want to give a flavor and ask you -  
10 - I'll read a couple of the patents and just ask you.

11 A       Uh-huh.

12 Q       Because I don't see it anywhere in your valuation  
13 analysis where these patents have any value, I think, in  
14 terms of the analysis; although, I do believe they have  
15 tremendous value to the company.

16       So, there's actually 13 patents. I'm looking at  
17 Exhibit F for US PTO publication data and if you look at each  
18 patent, below it, it shows the date it's filed. So, the one  
19 I'm looking at, which looked very interesting was orally  
20 administrable formulations for the controlled release of a  
21 pharmacologically active agent.

22       You'll have to bear with me. It's 4:45 in the morning  
23 where I am so and I probably need new glasses, as well, but  
24 I'm just reading it.

25       Drug tablets that include an a controlled-release layer



1 of a moisture-sensitive active agent are prepared with  
2 lipidic matrix, forming excipient, a water-soluble channel  
3 forming excipient and a filler, each being non-hygroscopic,  
4 and it was filed on March 18, 2020, and it looks like the  
5 utility grant is dated July 9th, 2020.

6 Are you aware of that patent, Ms. Stratton?

7 A So, I actually went through these patent exhibits that  
8 you provided with the management team and my understanding is  
9 that many of these relate to their existing commercial  
10 products and from my pharmaceutical partner, I understand  
11 that it's very common to continue to have patents that  
12 support your commercial product and that that value is  
13 encased in the cash flows that that company can continue to  
14 generate from those commercial drugs.

15 So, our view -- and I did speak with the management  
16 team about this specifically -- you know, could you sell any  
17 of these patents? Were you able to get value?

18 And the answer is that you wouldn't want to, because  
19 that's how you protect your cash flow that we've projected in  
20 the discounted cash flow going forward.

21 Q Okay. I understand.

22 And the reason I bring it up is because I think in the  
23 previous hearing at one point you mentioned that in your  
24 valuation analysis there wasn't much value really given to  
25 Qsymia because in just four years, in 2024, generic products

1 are going to be available and so that meant that Qsymia sales  
2 would decrease.

3 But would you agree that this looks like a new method  
4 of the delivery, so I'm just thinking that the reason behind  
5 --

6 A Actually --

7 Q Okay.

8 A Maybe I can answer that for you.

9 So, actually we didn't -- we didn't actually hit Qsymia  
10 that much. In the projections, Qsymia is growing and it's  
11 actually the most profitable and held the most -- it's  
12 generating the most cash flow for the company even into the  
13 projection period and the way that we did the perpetuity  
14 growth method -- and, yes, we have to factor in NOLs -- but  
15 even if we assume the company was not a taxpayer into  
16 perpetuity, it would be more than a seven and a half percent  
17 reduction in cash flows from Qsymia. It would take more than  
18 that to have a different result.

19 So, my view is you could lose 20, 30, 40 percent of  
20 your market. You don't know until the generic hits.

21 We held a lot of discussions with the company. They  
22 have a lot of programs that they're putting in place so that  
23 they keep that revenue and cash flow going with Qsymia. So I  
24 do think we gave them a lot of credit for those programs;  
25 otherwise, we could have used 20 or 30 percent negative

1 perpetuity growth rate because that is their largest revenue,  
2 largest cash flow-generating asset and we did not. So, we  
3 gave them the benefit of the doubt and took a smaller  
4 negative number on that growth.

5 Q Okay. Because I was under the impression that you were  
6 valuing Qsymia as not being worth very much and then --

7 A No.

8 Q -- I think with these 13 utility patents, some of them  
9 very recently awarded, that they can continue to  
10 differentiate from the generics and maintain their ASPs and  
11 continue to grow the sales.

12 Are you also aware that they're seeking the European  
13 Union approval and that they're making progress with that or  
14 that it's supposed to be in the, I believe, the second half  
15 of this year.

16 A Yeah. And those are all in the projections. And,  
17 again, we have, because of these patents -- I wasn't aware  
18 exactly because of these patents until you gave us the list -  
19 - but in discussions with management, they told us we are  
20 going to find different ways so that we can keep our market  
21 or a large share of our market as the generics enter their  
22 market.

23 So, they do believe that our perpetuity of growth  
24 factor was very conservative, not only because we factored in  
25 NOLs, but also because, you know, it could be a much worse

1 situation. But we have factored in that we believe that  
2 they're going to be successful in their strategies, which  
3 includes these patents, to maintain much of their market  
4 share.

5 Q Okay. And just staying on this patent issue, I found  
6 another patent which is a combination therapy for pulmonary  
7 hypertension. The present invention provides compositions  
8 and methods for the treatment of pulmonary hypertension using  
9 combination therapy.

10 Are you aware of that patent?

11 A Yes, I am.

12 Q And is that valuable in your analysis, that if they  
13 come in with a new product as common hypertension therapy,  
14 that it would create a unique or a brand new revenue stream  
15 for the company?

16 A I think that that is in connection with the VI-0106.

17 So, they currently don't have a commercial product for  
18 which they can use the patent and it's part of the patent --  
19 it's part of what would go with VI-0106.

20 Q Right. But I guess what I'm trying to point out is  
21 since they have these patents, they clearly have a pipeline,  
22 I think, just beyond VI-0106, to have this combination  
23 therapy. I think there's other things they're working on.

24 And were any of those other things that they're working  
25 on, the pipeline, discussed with management and have you

1 valued them fully in your analysis?

2 A We believe that we have.

3 THE COURT: I'm sorry, I didn't hear that, Ms.  
4 Stratton.

5 THE WITNESS: Yes, we believe that we have valued  
6 all of their assets appropriately.

7 THE COURT: Well, I understand that, but his  
8 specific question on that particular patent and whether it  
9 was --

10 THE WITNESS: On this particular patent, so even  
11 after the fact -- again, I went through each of these patents  
12 with company management. They did not believe that any one  
13 patent could be sold to provide value to them today.

14 BY MR. MAKOSKY:

15 Q Well, I'm not necessarily asking about them selling the  
16 patents. I'm asking about the value the company wants under  
17 terms of a pipeline, because it doesn't seem like they're a  
18 pipeline and the pipeline, looking at these patents is a lot  
19 more extensive than I first even imagined it, but it doesn't  
20 seem like you're giving any valuation whatsoever to any of  
21 their pipeline.

22 And I just, I don't really see other biopharmaceutical  
23 companies being valued that way, where they're only looking  
24 at existing sales and not giving any kind of valuation  
25 whatsoever to the pipeline, which, as I've said, based on

1 these 13 utility patents that was brought to my attention, it  
2 seems like it's quite an extensive pipeline that they've got  
3 under development.

4 A Well, I disagree with you, Mr. Makosky. I do believe  
5 that our discounted cash flow does include the reasonable  
6 revenue projections, which are growing, and that our decision  
7 not to reduce the cash flows and for the perpetuity by a lot  
8 was because the company does have many things they're working  
9 on to keep Qsymia relevant.

10 Q Okay. So, you're maintaining that, basically, you're  
11 taking all this into account with your current valuation,  
12 it's all covered. Because this is new information that I  
13 didn't have before when I was trying to value the company and  
14 investing in it and thinking that they were going to bring a  
15 certain product to market, and now I find out that the actual  
16 pipeline is a lot more extensive than I thought.

17 And I was just wondering if you were aware of the  
18 patents and then you fully valued them in your analysis, but  
19 you are telling me that you have done so, correct?

20 A Yes. Yes.

21 And, again, I spoke to my pharmaceutical partner and  
22 it's not unusual. This is part of the process of keeping  
23 your commercialized products so that you can come up with new  
24 methods of delivery or other ways to use them, so that you  
25 can continue the life cycle of those products.

1 Q Okay. I think that answers the questions that I had,  
2 so thank you very much for your time.

3 A Thank you, Mr. Makosky.

4 THE COURT: Thank you.

5 Mr. Dijkstra?

6 CROSS-EXAMINATION

7 BY MR. DIJKSTRA:

8 Q Dennis Dijkstra, yes, I have a similar problem as Mr.  
9 Makosky, and for me it's also five o'clock in the morning, to  
10 please bear with me.

11 Ms. Stratton, good afternoon. I hope you're fine.  
12 I would like to ask you, what influence would you say the May  
13 20 notes being convertible had on potential investors?

14 A I'm sorry, from -- on potential investors?

15 I'm confused by that question.

16 Q I can clarify for you what I mean.

17 If I'm a potential investor 18 months ago or 10 months  
18 ago or even anywhere before November or in November still, I  
19 invest in the company. With that money, it's more successful  
20 and then (indiscernible) enterprise comes and says, okay,  
21 let's convert now and we own half the company.

22 That would be, for me, as an investor, very  
23 unattractive.

24 A Okay. I understand.

25 And our, again, our mandate, we, first, were trying to

1 refinance the company and there would no longer be the --  
2 that debt. So, our goal was to replace that debt, so I'm not  
3 sure what you're asking me.

4 Q I just want to know if any of the investors you spoke  
5 to -- you spoke to 101, I believe -- said, okay, we might be  
6 interested, but the noose around the neck of VIVUS, the sort  
7 of (indiscernible) being in this convertible option, that is  
8 making us back off.

9 Did you get any information out of the market?  
10 Because I remember Mr. Pinkas said that they've been going at  
11 it already for 10 months. I believe Mr. Thomas King even  
12 said 18 months. So, what kind of influence did that have?

13 A So, I don't believe that had any --

14 Q Did you -- sorry.

15 A So, I don't believe that had any influence on our  
16 investors, and at one point, you know, we even spoke to some  
17 other convertible security providers that might have helped  
18 us refinance the debt with another convertible security with  
19 a much further out maturity date. So, I don't think it had  
20 any impact on our process.

21 Q You don't, okay.

22 A The goal was to pay them off.

23 Q Okay. Thank you.

24 And do you know, perhaps, why there was no rights  
25 issued to shareholders? Was that ever considered?



1 A So, my understanding is that securing a rights offering  
2 with as many retail investors as VIVUS has would be very  
3 difficult to complete and not typically done. It's more  
4 typically done when you have more institutional investors and  
5 there are thousands of --

6 Q So, what --

7 A So, that was discussed and it was determined that with  
8 the number of retail customers that VIVUS has, it would not  
9 be -- you would not be successful in getting that completed.

10 Q So, it was considered, but the outcome was, no, we're  
11 not going to give it?

12 A I know it was discussed and we didn't do it, so, yes.

13 Q So, on that -- I think from all the correspondence on  
14 the docket, I think (indiscernible) around quite favored of  
15 VI-0106. I would like to get clear for myself how to  
16 understand the zero valuation for it.

17 If it were zero, like it were worthless, can it be  
18 disposed of?

19 A So, I think that I've had to amend my valuation there  
20 and I would say that it would be up to, worth up to \$1  
21 million when we did the (indiscernible) analysis.

22 Q There was a market (indiscernible).

23 A I did that analysis with my team and I did that  
24 analysis before we had an offer for the company.

25 Q So, it is not worthless; it is worth one million?

1 A That is what I had stated in my sum-of-the-parts  
2 analysis.

3 Q But it's not for sale?

4 A I don't know whether it's for sale or not.

5 Q You don't know, okay.

6 Is it correct to say that it's valued zero because --  
7 well, maybe one million -- but in your 45, your  
8 (indiscernible) 45, it's still concluded at zero -- but is it  
9 correct to say that the value is zero because 5 percent  
10 simply cannot see the path forward in regards of getting  
11 approval, coming to market, making a risk-adjustment revenue  
12 projection, is that why Piper is valuing it at zero?

13 A So, I can repeat why we think it has zero value. It  
14 was purchased in January of 2017 and, yes, the company has  
15 spent quite a bit of time on formulation. They did conduct a  
16 Phase I study, so though do have safety data, and it is,  
17 again, a 505(b)(q) because this molecule is, this drug is  
18 used for other treatments, so they can piggyback a little bit  
19 off of some of that safety, but because they're changing the  
20 formulation, they have to do some new safety data, as well.

21 But my understanding is they don't have any new  
22 efficacy data since purchasing that asset and when they  
23 bought that asset, they already had the data on the three  
24 compassionate-use patients, which they said there was some  
25 potential reversal of the disease on these three

1 compassionate-use patients.

2       Since then, they have no new data. I don't see why  
3 anyone would be willing to pay more than they did for an  
4 asset that hasn't been developed further than it was, other  
5 than a formulation. They don't have efficacy data.

6       And even with the path forward, even if they had  
7 funding, which they don't have funding today to go forward, I  
8 don't -- like, it's speculative. It's highly speculative  
9 when they will start that process, if their Phase II data  
10 will be -- will have good news. And it is my understanding  
11 that in the specialty pharmaceutical, they are not yet at the  
12 value inflection point.

13 Q       Okay.

14 A       This is when you have good efficacy data.

15 Q       So, that means whoever acquires VIVUS and assets might  
16 reap the benefits from it in the near future?

17 A       Or if they decide to invest in it, they might invest  
18 and it will sell.

19       I do also understand that there was a Stanford study,  
20 that they did to a Phase II(a), but it was on Class 1 and 2  
21 patients and that was considered a failure.

22 Q       Uh-huh. I thought --

23 A       Now, VIVUS is looking at using it on Class 3 and Class  
24 4 patients, which, Your Honor, because I have asked these  
25 questions, the phase -- the Class 1 and 2 are people who have

1 the disease, but they can live with it, so it's pretty -- and  
2 3 and 4, that means it's progressing further and, 4, you  
3 know, will perish from.

4 So, I do know that VIVUS' plan is to come up with a  
5 therapy that treats Class 3 and Class 4 patients, so that  
6 Phase II(a) study is Stanford did is not relevant to them,  
7 because they're looking at 3 and 4, and not 1 and 2; however,  
8 that study was considered a failure. They don't have  
9 efficacy data from that study.

10 Q But I uploaded an exhibit and there's three samples or  
11 three reports on (indiscernible) patients and that is pretty  
12 positive. Now, I'm not sure if you read it. I can bring it  
13 up for you, but let me see the number, because I filed quite  
14 a lot of them.

15 A Is this your Exhibit C.

16 Q C-2, actually, yes. C-2 from Document 207.

17 A Yes, and this is the same data that VIVUS had when they  
18 purchased the asset in 2017.

19 Q Okay. So, do you know or did they tell you from your  
20 health care department that some rare-disease drugs already  
21 get approval or some form of approval in Phase II if they are  
22 life-saving or life-extending?

23 A My understanding is that there -- this company does  
24 intend, if they have good results in their Phase II study,  
25 which my understanding means once they start a Phase II

1 study, that's 18 to 24 months into the future from starting  
2 that study, but if they do have good results, they could look  
3 for fast-track approval or breakthrough therapy.

4       They don't -- you don't automatically get it just  
5 because you're working on a therapy for a rare disease. So,  
6 orphan-drug status doesn't automatically give you approval;  
7 it gives you tax credits and it gives you -- you know, once  
8 it is approved, if it ever gets approved, it would give you  
9 exclusivity rights.

10 Q       But there are biotech valuation experts that take all  
11 of these things into consideration. They have -- they take  
12 all these parameters and they have a range of going to very  
13 conservative to very positive, of course, but you like  
14 midpoints, so we can take a midpoint there.

15       I'm a little bit confused by that because I wonder if  
16 Piper Sandler has no other customers or clients -- sorry --  
17 no other clients that are biotech, clinical-stage  
18 development, Part 1 companies, because how did you, at Piper  
19 Sandler, value them if you cannot do clinical-stage product  
20 valuations.

21       Do you have any of those clients at Piper Sandler?

22 A       So, we do and those are not my clients. The other --

23 Q       No, I --

24 A       The other pharmaceutical clients that we have are  
25 healthy. They're not stressed or distressed, so they

1 wouldn't be my clients.

2 But my partner, Jeff Ammerman, who has been very, very  
3 involved in this company in the valuation, and in the  
4 discussions of what we need to consider, I take his opinion  
5 very heavily in my decision on the valuation and his view is  
6 this asset has not progressed. There's no efficacy. And  
7 there's no reason for us to believe anyone would pay more  
8 than VIVUS paid when there's no new data since they bought  
9 it.

10 Q Did you say --

11 A And if you want to talk about the three compassionate-  
12 use patients, VIVUS knew about the compassionate-use patients  
13 when they bought the asset.

14 Q But did you just say you think you will not find  
15 anybody else that will pay what VIVUS paid because they  
16 valued it at 40 million; 1 million up front, 39 million  
17 milestones, plus royalties.

18 So, did you just say we're not going to find anybody  
19 who is willing to pay any more than 40 million?

20 A So, again, in order to get to any milestones, you have  
21 to invest a lot of money. So, my understanding is it's at  
22 least \$40 million to get through the Phase II and then  
23 potentially another 50 to 60 million for a Phase III.

24 They would hope for a breakthrough therapy, which means  
25 they could do the Phase III after it's in the market, but

1 we'd still have to pay that cost, so it is a substantial  
2 investment to continue to develop this product.

3 And while, you know, I hope that everyone is right and  
4 it can, it's disease-modifying and it can help a lot of  
5 people with this disease, because it's a horrible disease,  
6 it's very speculative right now on whether it can.

7 Q So, you say it's costs white a lot of money to get it  
8 to market, but in only half of what management projected will  
9 come through, we wouldn't be in this court today.

10 A But in order to get to any revenue for this product, it  
11 has to be approved and there's no data today that exists that  
12 says that it will be approved.

13 Q Okay.

14 A There's no data that says that it --

15 Q Sorry.

16 A I'm sorry.

17 THE COURT: Ms. Stratton, why don't you complete  
18 and then we'll go back to Mr. Dijkstra.

19 THE WITNESS: Okay. I would just say there is no  
20 new efficacy data. They haven't developed any Phase II  
21 efficacy data, which is the inflection point for value for  
22 developing pharmaceuticals.

23 BY MR. DIJKSTRA:

24 Q So, has the compound changed over the last, 2, 3, 4, 5  
25 years? Did they make any chemical change to it?

1 A So, my understanding is they did make some formulation  
2 changes they thought was necessary for stability. So, they  
3 have done some safety tests, but they have not done any  
4 efficacy tests.

5 Q So, if it worked four years ago and chemically nothing  
6 has changed because compound FK506 is today still FK506, it's  
7 being used in transplantations, it's being used in other  
8 fields. So, if it worked four years ago, why is it not going  
9 to work tomorrow or next week or in one year?

10 A I don't -- I think our view is a sample size of three  
11 compassionate-use patients is not a big enough sample to  
12 prove that efficacy.

13 Q And what about the pre-clinical data when they did it  
14 on the animal testing?

15 A So, again --

16 Q That's also --

17 A I am not aware of the animal testing. My understanding  
18 of the way the drugs are developed and where they have a  
19 value inflection is when you have Phase II efficacy data.

20 Q But you -- I understand you're not a biotech  
21 specialist; me neither -- I'm becoming more and more and more  
22 every day because I'm learning -- but the first  
23 (indiscernible) tested on, in this case, it was tested on  
24 rats. It was by (indiscernible) and Mrs. Etta Speakerkuther  
25 (phonetic) -- she's from Denver. And, actually, there, the



1 results were so satisfying that they went further into the  
2 process and next, at some point, VIVUS bought it.

3       So, I would say if it looks like a duck, it something  
4 else like a duck, it's probably a duck. So, that's why I'm  
5 asking you, why would something that worked four years ago,  
6 not work tomorrow or in one year? Why is there no -- I've  
7 seen many models. I think the industry calls it an RNPV,  
8 risk-adjusted, net-present value.

9       But it seems like Piper did nothing of that kind. The  
10 preliminary discussion materials, the first time I saw them  
11 was on the 18th. I didn't see them on the petition date. I  
12 didn't see them when we had the equity committee hearing.

13       So, only now, data starts to get clear for us, but  
14 still now on one of the most important hearings I think in  
15 the whole case, we don't have anything. You didn't provide  
16 anything on paper for us or -- concerning VI-0106.

17 A       And, again, I read through many of the exhibits that  
18 you put forth to the Court and I don't think that we would  
19 argue that if we had hit the value inflection point, Piper  
20 Sandler, my pharmaceutical partner, we know how to determine  
21 the market advise, we know how to do an NPV, it is based on  
22 (indiscernible) to the discounted cash flow; we know how to  
23 do all those exercises.

24       Our view is it's not appropriate to do today. So, I  
25 don't think we would argue with you on methodology, should we

1 thought -- if we thought this had value. We would have used  
2 those methodologies. We would have done some of the things  
3 that all of you have asked.

4 Where we're arguing is we don't believe VI-0106 has  
5 that value. It has not met the efficacy data information  
6 that we believe it needs to, to hit a value inflection point.

7 Q So, I can agree that we are on opposite sides, opposite  
8 views. But if you had 101 investors and nobody was  
9 interested, if you had Piper Sandler valuing this company so  
10 low, if Mr. (Indiscernible) valuing the liquidation value to  
11 almost like nothing, the VI-0106 value is worth nothing, why  
12 is IKON Enterprises (phonetic) interested in this company?

13 Why is it going in (indiscernible)? I still see 34  
14 people -- well, only 4 or 5 are -- the judge -- are unfaith  
15 [sic] shareholders and the rest is -- well, I don't want to  
16 be disrespectful, but that's a small army of specialists,  
17 where is all that money coming from, for this low-value,  
18 uninteresting company to everybody? What is all the effort  
19 about? I'm not getting it.

20 A So, Mr. Dijkstra, I would also say, like, my  
21 understanding is that IKON has been a debt holder for five  
22 years now, so I don't think they just got involved to try to  
23 take this asset away.

24 And I'd also argue that if you look at the implied  
25 market value of this company over time, over all that time

1 that Mr. Amos made the comments about how great VI-0106 is,  
2 no one increased the value of the stock.

3 When we went to try to do a refinance and the other  
4 investment bank looked for equity investors, no one valued  
5 this company higher. Those investors didn't value VI-0106,  
6 because if they did, we wouldn't be here today.

7 Q So, that's actually very thin ice where you're going on  
8 and I'll tell you why.

9 VIVUS stock, the past seven years or six years that I  
10 have been involved, has been on the (indiscernible) list  
11 many, many times. I had discussions with the company, with  
12 Mark Oki (phonetic). I can show you all the emails.

13 The 201 rules, the SEC 201 rule, was triggered almost  
14 every other day and you can see in my exhibit that the -- I  
15 would not say it was jumping off a cliff, off the white  
16 cliffs of Dover, but it's been going -- since I've been in  
17 the stock six years -- from, my average is twenty-six fifty  
18 and we are at nine cents today. So, you have a little bit of  
19 understanding where we went.

20 So, I think it's very -- did you research the  
21 information of what I'm saying?

22 It was quite public information. There's a lot of  
23 history on short sale. I mean, we went as high as 60 percent  
24 in 2014 to -- I don't know what it is today -- but this stock  
25 had been under a constant short sale pressure.

1           So, how can a stock -- how can you say the stock is  
2 low, so that's why the market is not (indiscernible)? I  
3 don't see the comparison there.

4       A       So, I think, to me, when there's a lot of sales being  
5 sold short, that also means people don't believe in the  
6 company. They don't believe that it's going to meet its  
7 projections. They don't believe that it's going to develop  
8 the drug they said they're going to develop, otherwise, there  
9 would be many more people. There wouldn't be short sellers.

10           MR. MANOUSIOUTHAKIS: Ms. Stratton, I apologize  
11 for interrupting, but we agreed that we are not going to  
12 assign intent to the shorting activity. Thank you.

13           THE WITNESS: Okay. Sorry, Doctor.

14           I guess I would just say that when we --

15           MR. BARR: Your Honor, I'm sorry.

16           Can we ask Ms. Stratton if she thinks she needs a  
17 break. We've been going a little bit longer. I think  
18 everybody is getting a little weary, but obviously it's up to  
19 her.

20           And I would ask, also, if there are questions,  
21 that they're directed to her, as opposed to statements and/or  
22 testimony.

23           MR. DIJKSTRA: Okay. It's 5:15 for me in the  
24 morning --

25           THE COURT: I'm not sure who was speaking, but I

1 did ask Ms. Stratton if she wanted a break and she said, no,  
2 she was good to go.

3 THE WITNESS: Would you mind if I turn my fan  
4 closer to -- would you mind if I just stepped over here and  
5 turn my fan on me.

6 THE COURT: You certainly may.

7 THE WITNESS: I have no air-conditioning in my  
8 house and it's very warm.

9 THE COURT: And, of course, Ms. Stratton, if at  
10 any point you need a break, all you need to do is let me  
11 know.

12 THE WITNESS: Okay. Thank you very much.

13 I'm fine. I'm sorry. I will -- Mr. Dijkstra,  
14 what was your question?

15 BY MR. DIJKSTRA:

16 Q No, let's step about from the thin ice and let go to  
17 the next question.

18 A Okay.

19 Q That fan is actually very noisy.

20 Can you hear me, because I hear a lot of humming in the  
21 audio now?

22 THE COURT: Please, everyone, make certain your  
23 phones are muted.

24 THE WITNESS: It's a quiet fan so you shouldn't  
25 hear it, but I turned it down a little.

1 BY MR. DIJKSTRA:

2 Q You stated to Mr. Demmy today that there are many ways  
3 valuation experts work; is that correct?

4 A I'm sorry, what was the question?

5 Q You stated to Mr. Demmy today that there are many ways  
6 valuation experts work; is that correct?

7 A Yes.

8 Q So, do you think it's possible that other biotech  
9 valuation specialists would come with another outcome for VI-  
10 0106?

11 A We don't believe so.

12 Q You don't believe so.

13 A No.

14 Q So, if I would suggest to you that on my comments,  
15 another biotech valuation specialist or two others are being  
16 invited to value only the VI-0106, because I think at this  
17 point, well, you know already I'm convinced that this is  
18 where the money is for the future, would that -- is that  
19 something that would be possible?

20 A So, our belief, and my pharmaceutical partner, who is  
21 an expert in specialty pharmaceutical, believes that there is  
22 no value -- this -- they have not hit a value inflection  
23 point and that there should be no value attributed to this  
24 PAH program.

25 Q So, your answer is no, you're not --

1 A The answer is no.

2 That's what he does for a living. He sells these  
3 assets. He takes these companies public. He does follow-on  
4 offerings. We do refinancings. He does not believe that  
5 this asset is at the value inflection point today.

6 Q Okay. So, does he also believe that the all other  
7 biotech valuation specialists -- there are a few, I think --  
8 would come to the same result?

9 A He believes that any credible biopharma -- this is not  
10 biotech; this is specialty pharma or biopharma. This is not  
11 a biotech company. He said biotech is entirely different  
12 than pharma. He believes that any other credible investment  
13 banker would come to the same conclusion.

14 Q So, how would you like me to call it, a pharmaceutical  
15 valuation specialist or biopharma?

16 A Yes.

17 MR. BARR: Your Honor, I didn't think that was a  
18 question. Again, I mean just are trying to -- I'm sorry,  
19 this is Matt Barr from Weil Gotshal -- bring some -- I know  
20 it's late in the morning for them or early in the morning --  
21 I apologize for the time difference -- I just want to make  
22 sure we're not getting our witness confused.

23 THE COURT: I think he's being pretty clear.

24 THE WITNESS: I was just trying to make it  
25 clear --

1 THE COURT: I understand his questions.

2 THE WITNESS: Your Honor, I was trying to make it  
3 clear that biotech is a different sector and we're not  
4 discussing a biotech company and I think that a biotech  
5 valuation is different than a specialty pharma valuation.

6 BY MR. DIJKSTRA:

7 Q And then I asked politely how would you like me to call  
8 it, is it biopharma? Is it pharmaceutical?

9 A So, biopharma includes biotech and specialty pharma.

10 So, this is in the biopharma space, but with respect to  
11 the specific assets, I think you have to look at the  
12 specialty pharma industry specifically.

13 Q Specialty pharma, okay. I'll write that down.

14 A I just want to make it clear because I do know that  
15 biotech has different forms of will valuation that we're not  
16 discussing today.

17 Q So, you declared on (indiscernible) that management had  
18 management had informed you that they have no intentions of  
19 developing it; is that correct?

20 A Yes.

21 Q Did they tell you what they have plans on the combo  
22 drug VI-0106 and (indiscernible) that they had filed utility  
23 patents for?

24 A I think that they filed that to give them more options  
25 to commercialize different products when they have approval



1 of VI-0106.

2 Q So, they didn't tell you exactly what they have plans  
3 (indiscernible) for it?

4 A I didn't seem relevant to me at the time.

5 Q What didn't seem relevant to you at the time, I'm  
6 sorry, I'm not getting it.

7 A I'm sorry. They're developing patents around a product  
8 that is not yet developed. It's just the same thing as  
9 developing product or patents around Qsymia, patents around  
10 Pancreaze, to protect and to able to expand or improve your  
11 cash flow.

12 They're not at a cash flow point at all with VI-0106,  
13 so when it's explained to me that they got a patent that  
14 would potentially help them in the future if this drug get  
15 approved and if they're in the market, I guess my point is,  
16 it is only valuable if they get it approved and if they are  
17 in the market. So, it's not relevant to me today.

18 Q Did you know about this utility patent before I filed a  
19 supplemental to my objection?

20 A I did not.

21 Q You did not.

22 Did they tell you, perhaps, what they will do with VI-  
23 0106 once they become a wholly-owned IKON Enterprise company?

24 A To my understanding, there was no funding mechanism as  
25 of yet for VI-0106. It's not included in the exit financing.

1 I do not know the intentions of IKON.

2 Q Okay. So, I heard you say today to Mr. Friedmann and  
3 to Mr. Manousiouthakis multiple times that even the mechanism  
4 of delivery is making a difference.

5 A No, I think that was in the Mankind transaction.

6 Q Yes.

7 A That was in the Mankind transaction, because that is  
8 for a drug that has already been approved for the treatment  
9 of PAH. I was explaining the difference between the Mankind  
10 transaction and the VI-0106.

11 Q But United, Mankind, much higher values because of the  
12 inhalation technology, right?

13 A I think the point there was that United Therapeutics  
14 wanted a method of delivery for another drug that they  
15 already have approved for PAH. It's the same drug, this  
16 gives it a different method of delivery.

17 Q But the way I read it in your declaration, and I'm sure  
18 it was not you who (indiscernible) that pharmaceutical  
19 language in (indiscernible).

20 A I can find it for you, too.

21 Q So, under C, and I quote, First, the drug has a  
22 different mechanism of action and drug (indiscernible)  
23 technologies.

24 That's what I'm reading here.

25 THE COURT: Mr. Dijkstra, where are you reading?

1 MR. DIJKSTRA: I'm sorry, page 29, C.

2 (Indiscernible) answers.

3 THE COURT: Thank you.

4 BY MR. DIJKSTRA:

5 Q It says here, first, the drug has two different  
6 mechanisms of actions and drug delivery technologies.

7 Is they are referring to the technology, its delivery,  
8 right, the drug?

9 A Yes.

10 Q Okay. Then Mankind's tech was developed to provide a  
11 more convenient inhalation device.

12 So, it's the second time they point out to the  
13 inhalation, right?

14 A Yes.

15 Q Then, relative to United Therapeutics (indiscernible),  
16 the (indiscernible) inhaled (indiscernible) PAH patients.  
17 That's the third time, right?

18 A Yes.

19 Q So, inhalation makes a difference here or at least a  
20 part of the difference, right?

21 A So, United Therapeutics' Tyvaso is already an inhaled  
22 product. I think their view was that this one would have a  
23 greater convenience than Tyvaso. So, they viewed it as a  
24 competitor that could work against their existing product in  
25 the PAH market.

1 Q So, if VI-0106 had an inhalation method that would work  
2 even better than the difficult (indiscernible) compound  
3 orally, would that add value to the asset?

4 A So, Mr. Dijkstra, I don't know. At the time if VI-0106  
5 were to be approved, I don't know what the competitive  
6 landscape would be at that time. There may be other products  
7 that they are competing with, other than this one. So, it  
8 could provide value. I can't tell you that.

9 You're asking me a lot of contingencies and ifs and I  
10 can't answer that for you. It may or may not, it depends on  
11 what the competitive landscape is at the time when they get  
12 approval for VI-0106.

13 Q Let me give you two examples. In 2016 I have two  
14 choices. I can take the compound orally and go a long  
15 process of trying to make a formulation and delaying it and  
16 bring the company and shareholders into trouble or I can take  
17 it for inhalation and probably get it much quicker approved.  
18 Which option would you choose, inhalation or oral?

19 A I understand what you're asking me, Mr. Dijkstra, but  
20 what I'm saying is if VIVUS gets to approval for VI-0106, it  
21 may be that their all other competing products at the time  
22 are inhalation. I don't know that. It could be that -- we  
23 don't know that. That's in the future and I guess what  
24 you're saying is that could (indiscernible). Maybe that's  
25 true. I can't just agree with you.

1           Maybe it's true that the fact that they have a patent  
2 means that they could have it work to be inhaled would be  
3 better, but we're not to that point where they're at a  
4 commercial product. We're not at the point where VI-0106 has  
5 been approved to treat PAH.

6           So, in this case, Treprostinil has been approved to  
7 treat PAH and Mankind came up with a better delivery system,  
8 a better inhaler. So, yes, it's going to hurt United  
9 Therapeutics.

10           There's a competitive dynamic for this transaction that  
11 made this valuable and it's also for a treatment that's  
12 already been approved for PAH. VI-0106 has not been approved  
13 for PAH, so --

14 Q       Because we don't --

15 A       -- maybe the fact that they can inhale it is great,  
16 but, you know, we're years away from that.

17 Q       So, but the fact that we are -- the fact that we went  
18 oral is where we are today. We have a delay and now you are  
19 using it against us, the shareholders, that there is no  
20 (indiscernible) and no IND filed and no clinical trials.

21           So, if you, as a company, or you as the decision-maker  
22 had the choice in 2016 or 2017 when they purchased it, if you  
23 had the choice to go inhalation or oral, which decision would  
24 you make?

25 A       I mean I would take the inhalation, but I'm not sure

1 how that's relevant to the value of the VI-0106.

2 Q Well, I'll make it relevant for you right now.

3 A Okay.

4 Q Can you please look at my Exhibit B-1 and B-2, because  
5 exactly what you just said in 2016, the technique was already  
6 there.

7 A B-1?

8 Q B, B-1, and B-2.

9 A Okay.

10 Q Rhode Island University did a government-type study  
11 with reference to (indiscernible) of delivering through  
12 aerosol inhalation (indiscernible) 506 for the treatment of  
13 PAH and it worked like a charm.

14 And I don't understand why VIVUS (indiscernible) not  
15 acted on that. So I cannot tell you if they knew it or not  
16 knew it, but maybe it's possible that VIVUS' management knew  
17 about it and then exactly what they based their projections  
18 on in the June 19 presentation.

19 So, the technique is there. It is tried and tested.  
20 You can read it in my -- I'm not making it up. I was shocked  
21 when I found it.

22 Actually, we are opposite sides, but I was so happy  
23 that your health care department went into (indiscernible) to  
24 find Mr. Amati's claims fundamentally flawed because  
25 (indiscernible) I went looking on where do we stand with

1 (indiscernible) 506.

2 Well, we already had it in 2016. We probably could  
3 have already been to market. So, it's probably Mr. King I  
4 have to ask next why they didn't act on it. I think Mr. King  
5 has to answer us why he didn't take his fiduciary duties to  
6 shareholders and to make sure maximum value was, as they  
7 promised, maximum value was achieved.

8 I'm sorry, I'm getting agitated a little bit, but that  
9 is because I'm walking around with this information already  
10 for a few days.

11 So, it could have been us making 200, 300 million just  
12 for an additional payment or amounts (indiscernible) with  
13 United. It could have been us already.

14 So, does that add value to VI-0106 today?

15 A I don't believe that it does, but I hear what you're  
16 saying. I think what you're saying, if I can restate it, is  
17 that because it's been proven you can use an inhalant for VI-  
18 0106, that that provides value today.

19 Again, the only reason in our opinion that that Mankind  
20 got value for a Phase I asset was because it was a different  
21 delivery method for a drug that was already approved for the  
22 treatment of PAH. VI-0106 has not been approved for the  
23 treatment of PAH.

24 So, whether it's an inhalant or not doesn't matter  
25 today because you can't use it for the treatment of PAH until

1 you have gone through the approval process and they have not  
2 yet gotten efficacy data beyond the three compassionate-use  
3 patients, which was the basis for which the company purchased  
4 the asset.

5 Q Can I honestly tell you what feeling I get from the  
6 answer you just gave me?

7 The value zero is superglued on VI-0106 and it's just  
8 not going to come off. No matter what I throw, even if I  
9 would throw up a kitchen sink at you, it's not going to come  
10 off. It's going to stay at a zero value and that's at this  
11 time.

12 So, I thank you very much. I have further questions.

13 MR. DIJKSTRA: Thank you, Your Honor.

14 THE COURT: Thank you, Mr. Dijkstra.

15 Are there any more questions for Ms. Stratton from  
16 anyone who has not yet asked questions?

17 (No verbal response)

18 THE COURT: Okay. I don't hear any. Let me ask a  
19 few.

20 THE WITNESS: Okay.

21 THE COURT: And they're a follow-up, really, on  
22 questions everyone has asked, but probably more directly, Mr.  
23 Dijkstra.

24 So, as a lawyer, by training, it's intuitive to me  
25 that VI-0106 has zero value and I quite, frankly, hear your



1 answer changing today from what I think was in the report, so  
2 I want to make sure I understand. And from my lawyer  
3 training, for example, I'm used to using decision trees. I  
4 don't know if you have used decision trees, Ms. Stratton --

5 THE WITNESS: I understand what decision trees  
6 are.

7 THE COURT: And we look at alternatives and we say  
8 if X happens with Y percent of probability, we get this  
9 result and if Z happens with A percent of probability, we get  
10 another result. And if Z occurs over a period of time with Q  
11 percent of probability we get another result.

12 And so, it's for the intuitive for me that  
13 anything is ever zero. Is there such a methodology for  
14 valuing a company, and I'll probably use the wrong term, too,  
15 but in the pharma space, that has products in the pipeline,  
16 and let's say, start with products in the pipeline and then  
17 no commercial products and then we can add on commercial  
18 products and we can go from there, but this is what makes no  
19 intuitive sense to me.

20 THE WITNESS: Okay. So, I'll explain to you, as  
21 explained to the process, as explained by my pharmaceutical  
22 partner. So, when a product as efficacy data, you can look,  
23 and there are percentages at that point in time, what  
24 percentages of those drugs get approved.

25 The further you are along in your Phase II study,

1 the higher percentage chance you may know a better, yes or  
2 no, right, if it's going to be approved -- if it's working or  
3 not.

4 We're not there. So, we are at they have some  
5 safety data. They have three patients, which was very  
6 promising.

7 And can I walk you through what I've asked myself  
8 as I went through the process? If this really were worth a  
9 billion dollars, why wouldn't the company have spent every  
10 penny they had developing the product?

11 And the answer is because it's very high-risk;  
12 that's what I was told. Because there are a lot of risks and  
13 there are a lot of ifs.

14 THE COURT: I'm not sure if that meshes with some  
15 of the statements that management has made in their public  
16 statements, and I'll have to go back and look at that in  
17 terms of when they thought they could put the IND in and what  
18 they thought the Phase II testing was going to be. I'm not  
19 sure that I saw astronomical numbers, in fact, I think I  
20 didn't, but I could be wrong.

21 But I'm not talking -- I'm talking generically  
22 now, because I want to understand generically, if a company  
23 came to your group that sells or values pharma companies for  
24 sale and then you can tell me why it's a different issues for  
25 a restructuring, but if they came to your group, would your

1 group say, I'm sorry, we can't help you at all. Your company  
2 is worth zero, nobody is interested in it. There's not a  
3 competitor who you would go to and sell your product to.

4 There's not some company with synergies who would  
5 be interested in your product. It's just zero because you  
6 haven't -- you have had no efficacy studies and there's just  
7 nothing there anybody wants.

8 THE WITNESS: So, I will -- we've had hours of  
9 discussions. So, this wasn't taken likely where we just  
10 said, You know what? There's no value to the VI-0106.

11 Our group, my group, and the restructuring special  
12 situations team and the group from the specialty pharma team,  
13 we had hours of discussions around this issue. We didn't  
14 take this lightly. We understood that this was a big issue  
15 on value.

16 And in those hours of discussions, we talked about  
17 the competition, the treatments that are already in the  
18 market for PAH, the treatments that are in development and  
19 further and higher phases than this company today, and  
20 there's more than 12 in development that are at further  
21 stages than this company. And so, based on the totality of  
22 everything that we discussed, it was our decision that VI-  
23 0106, and I amended it to the million dollars for, you know,  
24 what they had paid for it, but we don't think that there  
25 would be people who would want to develop this --

1 THE COURT: Well, we won't know until --

2 THE WITNESS: -- because there's so much  
3 competition today. And when they bought it in 2017, there  
4 was less competition.

5 So, there are other competitors out there that  
6 have product that are further along. There are other ones  
7 that are (indiscernible) modifying that are further along,  
8 and we think that it's going to be very difficult for VIVUS  
9 to get this. We don't know if it will be approved. They  
10 don't have the efficacy data.

11 And at some point, if they do get it approved,  
12 there might already be a really crowded market and their  
13 share would be so small, it wouldn't be as valuable as  
14 they're discussing today.

15 BY MR. DIJKSTRA:

16 Q And that's why you would play it out in a decision tree  
17 fashion, to figure out --

18 THE WITNESS: Yes.

19 Q what the --

20 THE WITNESS: Yes.

21 Q -- what that was. But you're not even --

22 THE WITNESS: Yes.

23 Q -- out a limb, right? There's no limb --

24 THE WITNESS: No.

25 Q -- to your tree, is the testimony.

1 THE WITNESS: Yes.

2 Q Did the -- when did this thinking occur? Because my  
3 understanding of your expert report, this thinking wasn't in  
4 it. My understanding at least of your expert report is,  
5 because VI-0106 has no earnings, you would -- and no cash  
6 flow, it wouldn't be included in a cash flow, a discounted  
7 cash flow methodology. So my understanding is it just  
8 doesn't get included --

9 THE WITNESS: So --

10 Q -- because, in fact, there are no revenues.

11 THE WITNESS: But that's not accurate. If this  
12 was in a Phase IIA setting with some good results, we would,  
13 in fact, likely value this separately. We -- we would  
14 probably do a discounted cash flow separate from our  
15 discounted cash flow that would be a much longer projection  
16 period, and we would look for precedent transactions that are  
17 exactly in this place to view those. We wouldn't look at  
18 one, we wouldn't look at two, as we -- had been suggested;  
19 we'd look at all of them. But it is not -- there's --  
20 they're not to that point.

21 Q Okay. Well --

22 THE WITNESS: And so I'm --

23 Q -- that's interesting --

24 THE WITNESS: I'm sorry if --

25 Q -- because that --

1 THE WITNESS: -- that wasn't in -- if that's not  
2 what's stated in there. But they're not to the point that we  
3 believe that there is value. If it were to the point where  
4 we believe there should be value, a lot of these things that  
5 have been exhibits for Mr. Dijkstra, we would have done those  
6 things. We would have valued it using a discounted cash flow  
7 with a much longer projection period because there -- it  
8 wouldn't be in the projection, right? It wouldn't -- it  
9 wouldn't be in this projection period, it wouldn't -- there  
10 wouldn't be revenue before 2023, there would only be cost.  
11 But --

12 UNIDENTIFIED: (Indiscernible)

13 THE WITNESS: -- (indiscernible)

14 THE COURT: No, nobody else gets to talk right  
15 now.

16 THE WITNESS: So I think the difference here is  
17 our view is that it's not at the point where you would give  
18 it value. If it were -- and that's why I said today to some  
19 of the *pro se* shareholders I'm not arguing valuation method.  
20 If we decided to value it, I think I agree with them, we  
21 would have used some of those methodologies. What I'm  
22 arguing is we don't believe it's to that point where you  
23 should value it.

24 BY THE COURT:

25 Q Okay. I'm not sure I understood that before, I'm not

1 sure that was in your report, although I will go back and  
2 take a look at it. But my understanding of your report was  
3 it's not included in a DCF because there are no earnings,  
4 it's not included in a comparable because the companies or  
5 transactions you chose were for commercial -- were for  
6 commercialized drugs and not pipeline drugs, so it's just not  
7 included in any of those.

8 Now, because of the parameters that you chose to use,  
9 now I'm hearing something different, which is that it wasn't  
10 included in those models because, again, you attribute no  
11 value to it because it is not developed enough yet to have a  
12 value because it hasn't gone through Phase II and an efficacy  
13 trial.

14 And is it also your testimony that there's no  
15 competitor or no synergies with any company out there who  
16 would be willing to pay something for it?

17 A I guess it's my opinion -- I have been approached by  
18 other pharmaceutical companies for the company's other drugs  
19 during this bankruptcy; I have not been approached by any  
20 other pharmaceutical for VI-0106. I mean, it's a crowded  
21 space. There's a dozen PH programs in the -- in development  
22 today for a -- you know, as we said, a rare disease. So the  
23 addressable market is -- will be small, if all of those are  
24 approved or some of those are approved.

25 Q Well, supposedly, that could have been modeled. But I

1 understand now, I think, a little differently where you're  
2 coming from with respect to this particular product.  
3 Obviously, I don't know what that means, where I come down as  
4 to what that means.

5 But I also was surprised to see that you would consider  
6 some evidence of market value an offer of a million dollars.  
7 Why would you consider that some evidence of market value?

8 A I -- because it was offered. Mr. Chlavin claims to know  
9 everything about VI-0106, he has all of the information that  
10 everyone else has, and that is what he chose to offer the  
11 company.

12 Q Maybe he offered it because you valued it at zero, and  
13 it has nothing to do with market value. Is that a  
14 possibility?

15 A It could be.

16 Q I think more likely possibility. I was surprised by  
17 that.

18 Does the fact that, when VIVUS bought the asset, it  
19 agreed to pay \$39 million over time as it met certain  
20 milestones have no value? Grant -- I know it hasn't met the  
21 milestones; that's not what I'm asking. Does -- is that not  
22 indicative of any value?

23 A So that's contingent value. So, again, my understanding  
24 is when -- if we were to look at any of those licensing  
25 programs, we also look at the purchase price for what you



1 paid -- and then you present value those back with some -- I  
2 mean, I don't -- I don't know what the value would be  
3 because, at this point, it's speculative.

4 Q At this point, it's?

5 A It's speculative.

6 So, when we look at the other products that have been  
7 sold, they are typically sold at a later stage in  
8 development. So, when you get information, you can actually  
9 do the decision tree you're talking about and see what they  
10 actually are paying.

11 Q But it was speculative then, at the time. So what's  
12 changed?

13 A Yes. It's still speculative, so what would change? Why  
14 would someone pay more than a million dollars today, if they  
15 paid a million dollars then?

16 Q Well, they didn't pay just a million dollars. They paid  
17 a million dollars, plus 39 million, if certain milestones are  
18 hit. That was the purchase price, that was the  
19 consideration, right?

20 A So -- yes.

21 Q So why would that change?

22 A But that would still potentially only bring a million  
23 dollars to the -- to the estate today because the rest would  
24 be contingent.

25 Q So the contingency has no value.

1 Does it have less value than it had when VIVUS  
2 purchased it?

3 A I would say yes.

4 Q Because?

5 A Because it's been three and a half years since they've  
6 purchased that, they have not gained any new efficacy data,  
7 and there are many more competitors today then there were  
8 when they purchased that in January of 2017.

9 Q Okay.

10 A My headset just died, so let me try a different one.

11 (Pause in proceedings)

12 Q In your declaration, you said in the footnote that you  
13 would add to net debt the \$5 million, minimum payment that's  
14 going to equity holders. Do you remember that?

15 A I'm sorry. I don't know where that -- where that is.  
16 Now I've got this all messed up.

17 Q Let me see if I can tell you. It's in Footnote 5, on  
18 Page 5.

19 A Yes, I would.

20 Q What methodology is that based on?

21 A Because the fact that they're already getting \$5  
22 million, to me, means, if I'm taking the 270.7 million  
23 effective date claims estimate, for them to receive more  
24 value than our valuation, we need to be 5 million more than  
25 the effective date claims estimate because we are --

1 Q But that --

2 A -- giving them \$5 million.

3 Q That was a gift, right? Would you add a gift to net  
4 debt? What methodology does that?

5 A It is a gift that has value, it has a five-million-  
6 dollar value.

7 Q It has value to the equity holders. My question is:  
8 Under what theory and what methodology would you add a five-  
9 million-dollar gift to net debt to come up with the hurdle  
10 number for a total enterprise valuation calculation? I  
11 haven't seen that before. So I'm asking under what  
12 methodology that would happen?

13 A I -- I don't know that this is a methodology. But I  
14 guess what we're saying is the equity holders wouldn't be  
15 entitled to more until we reached the effective date claims  
16 estimate, and you know, plus this \$5 million that they're  
17 receiving as a gift. I don't believe that, if we were at --  
18 our valuation was two seventy -- was at 275.7, that they  
19 would get more than the \$5 million to which they're getting,  
20 I think is the theory behind that.

21 Q I have to say I'm unclear on adjustments made to  
22 management projections, but I will look through the papers  
23 for that.

24 That's probably all the questions -- I have other  
25 questions, but they're probably not for you, Ms. Stratton.

1 So thank you very much. Do you need a break before redirect?

2 A I wouldn't -- I wouldn't mind having a break.

3 Q Okay. How long would you like?

4 A Five minutes is fine.

5 THE COURT: Okay. Well, why don't we -- why don't  
6 we do this? Let's take 15, we've been going a while. Let's  
7 take 15. And then we're going to talk about -- after  
8 redirect, we'll talk about how we proceed from here. Thank  
9 you.

10 MR. FRIEDMANN: Thank you, Your Honor.

11 (Recess taken at 6:52 p.m.)

12 (Proceedings resume at 7:10 p.m.)

13 MR. FRIEDMANN: This is Jared Friedmann, Your  
14 Honor, yes.

15 THE COURT: Thank you. And everyone please make  
16 sure your phones are muted, except for Mr. Friedmann and Ms.  
17 Stratton. Thank you.

18 Mr. Friedmann.

19 MR. FRIEDMANN: Thank you, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. FRIEDMANN:

22 Q Ms. Stratton, I'd like to go back through some of the  
23 issues that were raised and give you an opportunity to  
24 provide some more clarity on some of them.

25 You may remember -- it feels like a while ago, I'm sure

1 -- during Mr. Demmy's cross-examination, he spent a lot of  
2 time asking you about your decisions used on the median  
3 versus the mean. In particular, we were looking at the  
4 selected public comparables analysis that you did. Do you  
5 recall that discussion?

6 A Yes.

7 Q Okay. Can you explain to us why you made the decision  
8 to use the median, rather than the mean?

9 A So the mean is an average of all of the points of -- the  
10 whole universe. And what that does is allows ones that are  
11 very low or very high to influence the number, rather than  
12 when you use the median, it is the midpoint of all of those -  
13 - those numbers. So it is -- you're taking a full range and  
14 you're saying this is the range, and the mean could be down  
15 here, it could be up here. It's heavily influenced by  
16 outliers. So, in our opinion, taking the median is a little  
17 bit more conservative because you're not allowing those  
18 outliers to be the numbers, to influence the numbers.

19 Q In the event that you were to use -- well, first of all  
20 -- strike that.

21 What is the basis for that view? Where are you getting  
22 that from? Is that something that is your personal opinion?  
23 Is that something you're getting from somewhere else? What's  
24 the basis for having that view that the median is more  
25 appropriate here.

1 Q It's -- it's part of valuation theory. I will not argue  
2 that other people don't use mean because people do. Some  
3 people might do what makes sense for their different -- it  
4 may be that there's not outliers and there's not a difference  
5 between median and mean.

6 It is our practice to use median. When we look at  
7 fairness opinions, we typically use the median. So I -- it's  
8 -- it's something that is my practice because I believe it is  
9 more accurate than using something influenced by the  
10 outliers.

11 Q How do you deal with that outlier issue for someone who  
12 does use the mean; do you know how they would do that?

13 A Oftentimes, the other thing you can do is take out the  
14 outliers, and then a mean might be more appropriate. In our  
15 case, we didn't want to take out the sample size. We wanted  
16 everyone to see what the samples were and who the comparables  
17 were. But I have seen when someone has used a mean, was able  
18 to take out the high ones or the low ones.

19 Q Okay. And do you know -- when Mr. Demmy represented his  
20 math to you, do you know whether or not he was including the  
21 outliers or if he had taken them out when he gave you what  
22 the mean was?

23 A I would assume he just did the simple average to get the  
24 mean.

25 Q Okay. All right. The next one is going to be a little

1 more complicated because it's a document, so let me see if I  
2 can figure out a way to do this efficiently, given the hour.

3       There was some discussion, also, during Mr. Demmy's  
4 cross-examination, Ms. Stratton, if you recall, regarding  
5 whether or not there was some difference between the -- what  
6 was included in the disclosure statement with respect to the  
7 financial projections and the financial projections in your  
8 discounted cash flow. Do you recall that discussion?

9 A     Yes. Yes.

10               MR. FRIEDMANN: Okay. And Ms. Dougherty, if we  
11 still have the ability to put up Exhibit B, that might make  
12 this a little bit easier. I'm looking to put up Slide 10.

13               MS. DOUGHERTY: Yes, give me one moment.

14 BY MR. FRIEDMANN:

15 Q     Okay. And while she's doing that, Ms. Stratton, if you  
16 could also, at the same time, take a look at what I believe  
17 was marked as Chlavin Exhibit 1, which was Exhibit E from the  
18 disclosure statement, which showed the financial projections.  
19 And we were looking at the chart on Page 5.

20 A     It doesn't seem to that -- listed that way. Which one  
21 was it, Chlavin Exhibit?

22 Q     Yeah. So it's -- it was Page 228 out of 235.

23 A     Yeah. Which exhibit was that? I'm sorry. Exhibit?

24 Q     It's Exhibit 1.

25 A     Okay. I'm sorry. I have so many binders. Let me just

1 -- let me just find it in the plan, I have the plan, of  
2 course, sitting here.

3 (Witness reviews documents)

4 A What number, 235?

5 Q It should be on Page 228 out of 235.

6 A Okay.

7 (Witness reviews documents)

8 A Okay.

9 Q Okay. So what I'd like to do here is a little bit of  
10 comparison, and give you some time here, rather than going  
11 quickly, as it was before, which is in -- if I'm looking  
12 first at the chart on -- it's Page 5 of the financial  
13 projections on Page 228 of 235. Are you looking at that  
14 chart that says "VIVUS' Financial Forecast"?

15 A Yes.

16 Q So let's take, for example, the amount you have there  
17 for the 2021 EBITDA number. Do you see that?

18 A Yes.

19 Q And what is that number?

20 A 17.3.

21 Q All right. And now, if you go over to what's -- what  
22 Miss -- Taylor put up on the -- on the screen for everybody,  
23 and we look at 2021, and you look at the operating income  
24 amount -- and that's 0.6, right?

25 A Yes.



1 Q And then you add to it the depreciation and amortization  
2 -- which is another 14.8, right?

3 A Yes.

4 Q And then you add the stock-based compensation -- which  
5 is a number -- which is another 1.9 million, right?

6 A Yes.

7 Q What is that total? And take a moment to figure that  
8 out, if you need it.

9 A So that is 17.3.

10 Q So is that the same number that was in the financial  
11 forecast and disclosure statement?

12 A Yes, and that would be the -- the math on it, too. And  
13 I'm sorry, that is right, but you don't actually use EBITDA  
14 in the discounted cash flow; you start at a different number.  
15 So you won't see the same exact 17.3, unless you add up those  
16 before the capital expenditures and change in working  
17 capital.

18 Q The point is, though, essentially, that this is showing,  
19 if you add those three numbers together, you get the EBITDA  
20 numbers, right? And the same would be true for 2022 and  
21 2023?

22 A Yes.

23 Q Okay. So there was no bait and switch here, where there  
24 one set of projections that were put into the disclosure  
25 statement and then another set of projections that you used

1 for your discounted cash flow, when you did the enterprise  
2 valuation, correct?

3 A No, and I --

4 MR. DEMMY: Well --

5 A -- think what --

6 MR. DEMMY: -- it's --

7 A -- what I was trying to say --

8 MR. DEMMY: Excuse me, Your Honor. And I  
9 apologize, but I have to object to that question. That's --  
10 it's an argumentative question, it's leading, the use of the  
11 characterization "bait and switch," I never used those words.  
12 So I'd object to that question.

13 THE COURT: Sustained.

14 MR. FRIEDMANN: I'll rephrase, Your Honor.

15 MR. DEMMY: Well --

16 BY MR. FRIEDMANN:

17 Q Ms. Stratton --

18 MR. DEMMY: -- Your Honor, I object to the  
19 rephrasing because he should go on to another topic after a  
20 leading objection has been sustained.

21 THE COURT: I'll let you rephrase this time.

22 MR. FRIEDMANN: Thank you, Your Honor.

23 BY MR. FRIEDMANN:

24 Q Ms. Stratton, were the same numbers provided in the  
25 disclosure statement, where you set forth the financial

1 forecast that you used in your discounted cash flow analysis  
2 that was part of your enterprise valuation?

3 A Yes, it comes from the same set of projections.

4 Q Thank you.

5 MR. FRIEDMANN: While we have this, Taylor, can  
6 you please move to -- I think it's Slide 11, the WACC?

7 Perfect. Thank you.

8 BY MR. FRIEDMANN:

9 Q Ms. Stratton, do you recall, also, you were asked some  
10 questions about the cost of debt that you used as part of  
11 your WACC analysis?

12 A Yes.

13 Q And can you remind the Court why you chose 13 percent to  
14 use there?

15 A Yes. We were -- we actually were in the market for  
16 first lien debt for this company with the same set of  
17 projections. And the rate that we could achieve for a first  
18 lien debt for this company was at 13 percent. So, when we  
19 talk about our market test, this is the rate for our first  
20 lien debt.

21 Q Okay. And then there was a suggestion, if you recall,  
22 by Mr. Demmy that, instead, you should have taken the  
23 interest rate from the exit facility, correct?

24 A Yes.

25 Q Do you recall that?

1 A Yes.

2 Q And I believe you suggested so, instead, you could have  
3 used 11 percent, which is the interest rate in the exit  
4 facility, correct?

5 A Yes.

6 Q Okay. Are you aware of whether or not there was a  
7 commitment fee in the exit facility of 2.5 percent?

8 A I believe that's -- I have it somewhere, but I believe  
9 it's about that.

10 Q To what extent, if you were going to rely on the exit  
11 facility to calculate the cost of debt in connection with the  
12 WACC analysis, would you have to include both the interest  
13 rate of 11 percent and the commitment fee of 2.5 percent,  
14 when determining what to plug in as the cost of debt?

15 A Well, I would argue, though, that this cost of debt does  
16 not include all of the fees that would be associated with  
17 this debt, either. However, our decision not to use the exit  
18 facility interest rate was because we didn't believe that was  
19 the market rate. Oftentimes, if you're the shareholder and  
20 the lender, you don't come to terms that are necessarily  
21 market. I note you would not want to have something above  
22 market, but it's often under market.

23 Q So, if someone were to use the exit facility to  
24 calculate the cost of debt, what would it have to include?  
25 You said that you wouldn't just use the interest rate and the

1 commitment fee. But what else would you include?

2 A No, we -- that's what we would use. I'm just saying I  
3 note that this 13 percent would be a lot higher if I actually  
4 used all the other fees that our market lender was going to  
5 approve.

6 Q Okay. Are you saying that the 13 percent on the market  
7 lender would also be higher, if you included all the fees?

8 A Yes.

9 Q Got it. Okay. Thank you for that clarification.

10 MR. FRIEDMANN: Ms. Dougherty, could we go back to  
11 page 3, please?

12 BY MR. FRIEDMANN:

13 Q And Ms. Stratton, you -- I'm sure you can't forget  
14 because there were a lot of questions about this regarding  
15 why cash was subtracted as part of your pre-petition market  
16 valuation. Do you remember those questions?

17 A Yes.

18 Q And can you explain exactly, what is the formula that's  
19 generally recognized in the field of valuations for doing a  
20 market valuation, starting with the -- starting with the  
21 stock price?

22 A So -- so just the formula for enterprise value is net  
23 debt plus equity value. So --

24 Q And so what --

25 A -- if you were doing -- so, in this case, our market --

1 our value of our equity is the market capitalization, which  
2 is the stock price on this date, times the shares  
3 outstanding. The net debt would be the sum of the 61.4,  
4 169.2, plus 1.1, less the \$31 million of cash on hand.

5 Q Okay. And it's that last piece, I think, there were a  
6 lot of questions about, which is why -- if you actually have  
7 cash, why would you be subtracting cash. Can you explain  
8 that?

9 A Yeah, because different companies may have different  
10 reasons for holding different amounts of cash. And so, to  
11 compare enterprise value, you must factor in cash on a net  
12 basis. So you would apply the cash that's on your balance  
13 sheet against your debt to get to your net debt number.

14 If you look at some of our public company analysis --  
15 public company comps that we have on Page 7, you'll see, even  
16 in these cases, there's even companies who have \$600 million  
17 of cash on their balance sheet. And just because they have  
18 \$600 million of cash on their balance sheet, that should  
19 total into the total capitalization.

20 Q To what extent are -- is -- well, strike that.

21 To what extent does the fact -- does it factor in that  
22 the cash that a company is holding could be paid off -- could  
23 be used to pay off the debtor; does that play a role in this  
24 at all?

25 A Yes. That -- that's exactly what it is, is, when

1 looking at the enterprise value, it is net debt because you  
2 could use that cash to pay down debt. So it may be an  
3 artificially high debt value. So it is the value of the  
4 equity, plus the value of the debt is your enterprise value.

5 Q Okay.

6 (Pause in proceedings)

7 Q There were some questions, Ms. Stratton, that were  
8 raised by Mr. Manousiouthakis about whether or not the  
9 company had looked at alternatives and looked at their  
10 ability to access the equity capital market to pay off its  
11 debt. Do you recall those questions?

12 A Yes.

13 Q To what extent did the company do that?

14 A As I said, our equity capital markets had several  
15 discussions with the company. And when it looked like the  
16 RDO was what made sense, the company actually went to other -  
17 - I know they went to at least two other investment banks  
18 that specialize in the smaller offerings and talked to them  
19 about alternatives as well.

20 MR. FRIEDMANN: Can we go back to Page 3 for a  
21 second, Ms. Dougherty, please?

22 BY MR. FRIEDMANN:

23 Q Sorry, I'm jumping between questioners; hopefully it  
24 doesn't get confusing, Ms. Stratton.

25 Going back to a question Mr. Denny asked you. He asked

1 if you, if you recall, whether Piper Sandler had considered  
2 the price at which the debtors had offered their shares for  
3 sale on a date other than June 29th, 2020. Do you recall  
4 that?

5 A Yes.

6 Q And you testified that -- well, strike that.

7 First of all, to what extent would it have been  
8 appropriate to use a date other than June 29th, 2020, in your  
9 opinion, Ms. Stratton?

10 A I'm sorry. Can -- is the question why did we use 6/29?

11 Q Or why didn't you use another one? I believe it was  
12 suggested that maybe you should have used April 1st, 2020 to  
13 conduct your valuation analysis.

14 A So -- so, again --

15 Q Why not use that date?

16 A -- the -- the method of doing a valuation is that you  
17 want all the information as of the same day. So this was the  
18 value as of the date that we received the other public  
19 company's information, the date that we looked for precedent  
20 transactions, the date that we calculated the weighted  
21 average cost of capital. But we -- you know, I have looked  
22 at this value going back to March 15th, to see if it made a  
23 difference if I picked a different day --

24 Q And what --

25 A -- and --



1 Q -- have you --

2 A -- I would --

3 Q -- determined?

4 A The highest date would have been 3/31/2020, and it --  
5 the value, I believe, was somewhere around 239 million.

6 Q So you're saying that the implied enterprise value, even  
7 on the date when the stock price was the highest between  
8 March 15th and June 29th, was only 239.1 million?

9 A I -- I believe that was the number.

10 Q Okay. And based off of Mr. Pickering's claim analysis,  
11 had you used that date, what would it reflect, in terms of  
12 whether or not the company would be solvent or insolvent?

13 A The company would be insolvent.

14 Q Okay. Ms. Stratton, if you wouldn't mind turning, in  
15 your own declaration -- Mr. Demmy asked you about a Backs  
16 report that's attached as Exhibit F in your declaration.  
17 It's -- it begins on Page 108 of 114, but the information he  
18 asked you about was on Page 111.

19 (Witness reviews document)

20 Q This had to deal with the -- okay. Let me know when  
21 you're ready.

22 A Okay. Sorry. Hold on.

23 (Witness reviews document)

24 A And this was the report as of June 9th?

25 Q This is the -- this is your -- I'm sorry. This is June

1 9th, 2020, that's correct. It's Exhibit F in your --

2 A Okay.

3 Q -- in your declaration, it should be Page 111 of 114.

4 Is that where you are?

5 A Yes.

6 Q Okay. And in responding to Mr. Demmy's question about -

7 - well, you know, he asked you about this valuation of VI-

8 0106 in this first full paragraph on -- it's Page 3 of the

9 Zacks report, correct?

10 A Yes.

11 Q And I believe, in responding you pointed him to the last

12 sentence of that paragraph, which says:

13 "However, we note that this value is only  
14 appropriate after IND clearance and the start of Phase II  
15 trial, as per our methodology."

16 Is that -- am I remembering that correctly?

17 A Yes.

18 Q Okay. Ms. Stratton, for the record, to the best of your  
19 knowledge, has VI-0106 achieved IND clearance?

20 A No.

21 Q And based on your understanding of the debtors'  
22 finances, do the debtors currently have the resources to seek  
23 IND clearance or a Phase II safety and efficacy trial?

24 A No, they do not.

25 Q Ms. Stratton, you were also asked a number of questions

1 about the patents that I guess were initially brought up in  
2 Mr. Dijkstra's supplemental objection.

3 A Uh-huh.

4 Q Do you recall that?

5 A Yes, I do.

6 Q And I believe you had testified during direct about  
7 those patents relating to the existing commercial products.  
8 Is that correct?

9 A Yes.

10 Q So, in those circumstances, to what extent would those  
11 patents be able to provide additional new value beyond the  
12 current enterprise valuation that you've prepared?

13 A So, if this patent were able to provide a different  
14 market or a different product that's not in our projections,  
15 then I think that we would consider it.

16 In this case, these patents all help achieve the  
17 existing product lines and their revenue and cash flows. So  
18 our opinion is that they would extend the life or maintain  
19 market share in the market that the company is already in,  
20 which is factored into the projections. So, while I didn't  
21 know about these patents, the company management did.

22 Q Okay.

23 (Pause in proceedings)

24 Q And Ms. Stratton, you know, again, several times during  
25 Mr. Demmy's cross-examination, he asked you to hypothesize

1 the existence of another professional who might approach the  
2 enterprise valuation of debtors differently. Do you recall  
3 that?

4 A Yes.

5 Q And you know, you acknowledge that it was possible that  
6 another person might choose to do things differently than  
7 Piper Sandler had done, correct?

8 A Yes.

9 Q Now you also testified during your direct, at the very  
10 beginning of this hearing, that the methods that Piper  
11 Sandler employed were well recognized and generally accepted  
12 valuation methodologies. Do I have that correct?

13 A Yes.

14 Q What is the basis for that statement that you made, Ms.  
15 Stratton, that what Piper Sandler did is what's well  
16 recognized and generally accepted?

17 A Based on my valuation expertise.

18 (Pause in proceedings)

19 Q Ms. Stratton, sitting here today, do you have any reason  
20 to believe that another valuation expert, with all the same  
21 education and training and experience as you have in the  
22 restructuring world, and who is also an expert in corporate  
23 valuation, would arrive at the conclusion that the debtors  
24 will, in fact, be solvent at the effective date?

25 MR. DEMMY: Objection.

1 A No.

2 MR. DEMMY: Asking for speculation about somebody  
3 else's work and not hers.

4 THE COURT: Sustained.

5 MR. FRIEDMANN: Okay. Nothing further, Your  
6 Honor. Thank you.

7 THE COURT: Thank you.

8 Okay. Thank you, Ms. Stratton.

9 THE WITNESS: Uh-huh.

10 THE COURT: Okay. If I'm remembering correctly,  
11 Mr. Barr, are -- you have two more --

12 MR. BARR: We do, Judge.

13 THE COURT: -- witnesses, Mr. King and Mr.  
14 Pickering?

15 MR. BARR: Yes, that's correct, Judge.

16 THE COURT: Okay. And then I understand we may  
17 have at least one witness that one of the shareholders is  
18 going to call. Is that correct?

19 MR. DEMMY: Your Honor --

20 MR. BARR: Again, this is --

21 MR. DEMMY: -- this is John Demmy.

22 MR. BARR: -- Mr. Barr. Our understanding --  
23 sorry, John. It's our understanding that we may have one,  
24 which is -- I'm sorry. I'm remembering his first name now,  
25 but not his last -- oh, Ahmadi, Reza Ahmadi, who was the

1 letter that your -- was submitted to the Court, Judge. But I  
2 do believe Mr. Demmy may have one, as well, so I'll let him  
3 now answer the question.

4 MR. DEMMY: Yes, Your Honor. It's John Demmy of  
5 Saul Ewing for Mr. Chlavin. We had identified Mr. Chlavin on  
6 a very limited issue, and I would candidly say to the Court  
7 that it's unlikely that he would actually be a witness, and  
8 if he was, I don't think for a very long period of time; it  
9 would be immaterial, in terms of timing.

10 THE COURT: Thank you.

11 Okay. So Mr. Ahmadi may be -- Ahmadi may be a  
12 witness. And I did see that, I think that was in connection  
13 with Mr. Makosky, correct?

14 MR. MAKOSKY: Bruce Makosky. Yes, that's correct,  
15 Your Honor.

16 THE COURT: Okay. Mr. Dijkstra, do you have a  
17 witness?

18 MR. DIJKSTRA: No, Your Honor, I don't. Thank  
19 you.

20 THE COURT: Thank you.

21 And Mr. Manousiouthakis, do you have a witness?

22 MR. MANOUSIOUTHAKIS: No, I do not. But if Your  
23 Honor would permit me briefly to ask a couple of clarifying  
24 questions to Ms. Stratton, I would appreciate it.

25 THE COURT: Is that based on either questions that

1 Mr. Friedmann asked or that I asked?

2 MR. MANOUSIOUTHAKIS: It's related to the median  
3 use versus mean, so it's --

4 THE COURT: Say that again.

5 MR. MANOUSIOUTHAKIS: -- related to the --

6 THE COURT: Say that again.

7 MR. MANOUSIOUTHAKIS: It's related to the use of  
8 the median, instead of the mean, as Mr. Demmy was pursuing  
9 that line of questioning.

10 THE COURT: Okay. And Mr. Friedman did ask on  
11 redirect. Okay. I will permit questions on mean versus  
12 median, but we're not going on that.

13 Sorry, Ms. Stratton. You're back on, you're still  
14 under oath.

15 THE WITNESS: Okay.

16 THE COURT: Okay.

17 MR. MANOUSIOUTHAKIS: (Indiscernible)

18 THE COURT: Mr. Manousiouthakis.

19 RE CROSS-EXAMINATION

20 BY MR. MANOUSIOUTHAKIS:

21 Q Okay. Ms. Stratton, can you tell me if the mean, as a  
22 function, is a continuous function of the data? Like if the  
23 data change a little bit, does the mean change a little bit?

24 A I'm sorry. I'm not getting your -- I didn't understand  
25 your question.

1 Q So you are using data for companies, you are saying the

2 --

3 A Yes.

4 Q -- market capitalization is 1 billion. If the market

5 capitalization in one of your 16 companies becomes 1.01

6 billion, is the mean going to change?

7 A Yes.

8 Q Is the median going to change?

9 A It may or may not, depending on where that data point  
10 is.

11 Q Exactly.

12 So the median will only change if it is among the two  
13 or one company that is right in the middle of the list. So  
14 that means, let's say we added Arena to the list, and Arena  
15 has a four-billion-dollar valuation. Your median calculation  
16 would not change one iota. It's a completely  
17 misrepresentative concept that is never used whenever we do  
18 fix of data because it is a discontinuous function of the  
19 data. All the --

20 A So it would actually --

21 Q Pardon me. Let me just --

22 A It would actually --

23 Q -- (indiscernible) --

24 A -- change if --

25 Q -- and I will --



1 A -- you add another --

2 Q -- ask you the question.

3 A Okay.

4 Q If the value of Supernus changed by a factor of two,  
5 would your median calculation change?

6 A I'd have to look at where it is on the -- so, if you're  
7 looking at-- we took the median of --

8 Q You're --

9 A -- the enterprise value to revenue, so, yes, it would.

10 Q I'm talking about --

11 A (Indiscernible) it would.

12 Q -- the top company in your list. Let's say the  
13 enterprise value for Supernus is a thousand three, right?

14 A Yes. And Doctor, I think what I'm saying is, if you  
15 look at the enterprise to revenue 2020 multiple --

16 Q No, I --

17 A -- Supernus was --

18 Q I'm talking about --

19 A -- 2.3 times.

20 Q -- (indiscernible) value because this is what determine  
21 -- I don't care about revenue. Your (indiscernible)  
22 valuation is done based on the -- only on the four first  
23 columns of your spreadsheet in Table 44. All the other stuff  
24 is useless.

25 A No, that's inaccurate.

1 Q (Indiscernible) the first method of valuation. It's  
2 just the first column -- four columns, nothing else.

3 A (Indiscernible)

4 Q So, if I change the enterprise value of Supernus from a  
5 thousand three to 10 billion, would your median calculation  
6 change?

7 A I believe it would because we're actually using the  
8 median of the enterprise value to revenue, so that would  
9 change that number, and it's not --

10 Q (Indiscernible)

11 A -- at the top.

12 Q I'm asking about the enterprise value.

13 A But the enterprise value is not what drives the  
14 valuation for VIVUS. What drives the valuation for VIVUS is  
15 the enterprise value divided by the 2020 revenue.

16 Q I am trying to --

17 A So that --

18 Q -- point out --

19 A -- column --

20 Q I am trying to point out to the Court the flow of the  
21 use of the median, as a representative tool for data, because  
22 it is a discontinued function of the data. If enterprise  
23 value changes by a factor of 10 for Supernus, nothing  
24 changes. If the enterprise value for Retrophin changes by a  
25 factor of 20, nothing changes. It's just a discontinuous

1 function.

2 THE COURT: Okay. Let me --

3 UNIDENTIFIED: Your Honor.

4 MR. MANOUSIOUTHAKIS: Thank you.

5 THE COURT: Thank you.

6 MR. MANOUSIOUTHAKIS: (Indiscernible)

7 THE COURT: Let me ask Ms. Stratton to respond to  
8 that, so that I understand Ms. Stratton's view.

9 THE WITNESS: Okay. If you look at the enterprise  
10 to revenue 2020 column, the median of this column is what was  
11 used for the valuation against the 2020 projected revenue for  
12 VIVUS. And if you look at Supernus, if it were to increase  
13 by a factor of 10, it would possibly be the highest multiple.  
14 And so we would move the median -- the median would  
15 necessarily move up, given that it's at a 2.3 today.

16 THE COURT: Okay. So are you saying that the  
17 number -- so, if a -- if the enterprise value of --

18 THE WITNESS: If the enterprise value --

19 THE COURT: -- (indiscernible) --

20 THE WITNESS: -- (indiscernible) --

21 THE COURT: -- of a billion three -- right. If  
22 the enterprise value of a billion three goes up by a factor  
23 of ten, then the enterprise -- the revenue value of 2.3 will  
24 change.

25 THE WITNESS: Yes.

1 THE COURT: Okay. And that you're using that  
2 number -- so that, depending on how it changes -- and I don't  
3 know that -- but depending on how it changes, then that  
4 change -- that could change the median of --

5 THE WITNESS: Correct.

6 THE COURT: -- 2.8.

7 THE WITNESS: Correct.

8 THE COURT: Okay. I'll let you argue that to me  
9 in argument, Mr. Manousiouthakis, about why that's incorrect,  
10 but that's Ms. Stratton's explanation.

11 MR. MANOUSIOUTHAKIS: Well, if the enterprise  
12 value of a thousand three changes, the revenue doesn't have  
13 to change at all because the (indiscernible) it's different  
14 piece of information in a different column, collected from  
15 different people, different data. It has nothing to do with  
16 Column 4.

17 THE COURT: Okay. I'll have to --

18 MR. MANOUSIOUTHAKIS: (Indiscernible)

19 THE WITNESS: I understand -- I understand that.  
20 But the enterprise value column is not what drives the  
21 valuation formula.

22 THE COURT: Okay.

23 MR. MANOUSIOUTHAKIS: But you are (indiscernible)  
24 underneath each column.

25 THE COURT: Thank you. I'll let -- when we get to

1 argument on this point, if it's a relevant point, Mr.  
2 Manousiouthakis, I will let you make the argument then. But  
3 I -- this is Ms. Stratton's factual testimony, in her  
4 opinion, on it. Okay.

5 MR. MANOUSIOUTHAKIS: Thank you, Your Honor.

6 THE COURT: Okay. Thank you.

7 And now, Ms. Stratton, you're done.

8 THE WITNESS: Thank you.

9 (Witness excused)

10 THE COURT: Okay.

11 MR. BARR: So, Your Honor, again, Matt Barr for  
12 the record. We have two witnesses left. It sounds like Mr.  
13 Demmy likely does not, but may have a short presentation --

14 THE COURT: Uh-huh.

15 MR. BARR: -- with a witness. And then we assume  
16 that Mr. Makosky wants to put Mr. Ahmadi on. Obviously, we  
17 can ask him that question. So I guess we'll know if we have  
18 three or 3.25 witnesses left.

19 THE COURT: My understanding from Mr. Makosky is  
20 that, yes, he's going to ask questions of Mr. Ahmadi.

21 Okay. And the two of you are 11 hours ahead or  
22 behind, I guess. Either way, you're 11 hours difference.  
23 Okay.

24 MR. DIJKSTRA: Yeah, we're -- it's just going on 7  
25 a.m. here.

1 THE COURT: Okay. Somewhere in Asia. Okay.

2 (Pause in proceedings)

3 THE COURT: Without considering where every --  
4 without considering where everyone was located, I was looking  
5 at tomorrow at 11 Eastern. So what I'd like to do, given the  
6 time difference that we have, is to -- even if we're taking  
7 witnesses out of order -- is to have Mr. Ahmadi testify at a  
8 time that's more convenient for him. So I don't know what  
9 time that would be now. How long do you think -- we've got  
10 to get through all your testimony. And even if this would  
11 work for me, I need to check with the staff, who is staffing  
12 this. How long do we think this testimony is going to be?  
13 Mr. Makosky, do you have a sense?

14 MR. MAKOSKY: From my side, I don't think it will  
15 be that long, maybe 10 or -- 10 or 15 minutes, and then there  
16 will be some cross-examination, I imagine. So maybe 30  
17 minutes total.

18 THE COURT: Okay. I think that's optimistic, but  
19 --

20 MR. BARR: Your Honor, just to -- it's Matt Barr  
21 from Weil. I think we have an hour to an hour and a half, if  
22 Your Honor qualifies him as an expert to testify to what he  
23 presented to the Court. We could take voir dire tonight, if  
24 you wanted to. And if you made a decision that you didn't  
25 think it was appropriate to hear his testimony, that may save

1 time. Obviously, if you did believe you would want to hear  
2 it or give it the weight it deserves, we probably have an  
3 hour to an hour and a half of cross.

4 THE COURT: Okay. Well, since I have not given  
5 thought to the question of whether Mr. Ahmadi is qualified to  
6 give testimony in some fashion that is relevant, it might be  
7 quicker just to hear it, and I make up my mind after I hear  
8 it as to whether I believe it's relevant, which I know is  
9 backwards. But the -- I'm just looking at my calendar.

10 (Pause in proceedings)

11 THE COURT: I'm just -- Mr. Ahmadi, to the extent  
12 I'm taking your testimony, I want to make sure I understand  
13 it, and we've been going a long time. So, while I want to  
14 accommodate you, my concern is that this might not be the  
15 best time to start it.

16 So what I think I would like is for the parties to  
17 discuss a time that works to bring back Mr. Ahmadi. We can  
18 hear --

19 (Pause in proceedings)

20 THE COURT: We can hear the other witnesses  
21 tomorrow at 11, and the other witnesses being Mr. King --  
22 unless -- well, let me ask this. I'm assuming Mr. Ahmadi  
23 doesn't need to hear Mr. King's testimony, if it's going to  
24 the release issue. And Mr. Pickering (indiscernible) --

25 MR. BARR: It's 1129 and liquidity analysis.

1           Your Honor, I may be saying something that's  
2 obvious to you. Just to remind you, Mr. Ahmadi is in  
3 California, not in Asia. The --

4           THE COURT: Ah.

5           MR. BARR: The objecting parties are in Asia. So  
6 I did want to make sure you had that in your mind, as you  
7 were thinking through time zones.

8           THE COURT: Okay. Thank you.

9           (Pause in proceedings)

10          THE COURT: Okay. Then, if we were to reconvene  
11 tomorrow at 11 -- and that's 11 ish because I do have a  
12 hearing at 10, but it's been truncated, and I feel fairly  
13 confident that I will be done in less than an hour -- if we  
14 start at 11, that's eight o'clock California time, and that's  
15 ten o'clock Asia time --

16          MR. MAKOSKY: Yes --

17          THE COURT: -- in the --

18          MR. MAKOSKY: -- that's (indiscernible)

19          THE COURT: -- in the evening, right?

20          MR. MAKOSKY: Yep.

21          THE COURT: You're ahead --

22          MR. MAKOSKY: Thank you.

23          THE COURT: -- in the evening. I had a son in  
24 China for a semester, so I had to get used to that. My  
25 husband never could, he never knew what time it was there.



1           If the -- so I think that's what we're going to  
2 do. Timing is not ideal, my apologies to people in Asia.  
3 But Mr. Ahmadi, eight o'clock California time; eleven o'clock  
4 Eastern time, ten o'clock at night -- or whatever the  
5 equivalent is if I'm wrong -- Asia time, we're going to  
6 start.

7           And I have a hard stop at three o'clock Eastern  
8 time because I have a joint hearing with Judge Walrath in  
9 another case, I cannot -- where we both have counsel, so I  
10 cannot be late for that. I would think I can come back.  
11 It's an unusual -- we're doing a different kind of thing  
12 here. But I think that -- my guess is it's an hour, so it's  
13 possible we could continue after that. I'll have a better  
14 sense of that tomorrow. But I do have that hard stop at 3  
15 because I'm not going to inconvenience Judge Walrath. So  
16 that's what we're going to do. Everyone understand where we  
17 are?

18           MR. BARR: Yes.

19           THE COURT: Okay.

20           MR. BARR: And thank you, Your Honor. Thank you  
21 for all of us for you spending -- and your chambers -- the  
22 time you did tonight, to work so late into the night. Thank  
23 you.

24           THE COURT: You can -- I will accept for my staff;  
25 for me, it's part of the job. So we will reconvene tomorrow

1 11 ish. If it turns out that it looks like it's going to be  
2 too much after 11, my chambers will let me know, but I really  
3 think my ten o'clock will be done by then. So thank you,  
4 everyone. We are in recess until tomorrow at 11 Eastern.  
5 Good night.

6 COUNSEL: Thank you, Your Honor. Thank you, Your  
7 Honor.

8 (Proceedings adjourned to 8/26/20 at 11 a.m.)

9 (Concluded at 7:57 p.m.)

10  
11  
12 CERTIFICATE

13  
14 We certify that the foregoing is a correct transcript  
15 from the electronic sound recording of the proceedings in the  
16 above-entitled matter.

17 /s/Mary Zajackowski August 26, 2020  
18 Mary Zajackowski, CET\*\*D-531

19 /s/William J. Garling August 26, 2020  
20 William J. Garling, CE/T 543

21  
22 /s/Coleen Rand August 26, 2020  
23 Coleen Rand, AAERT Cert. No. 341  
24  
25